

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1896.

No. 677. 82.

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JOHN W. WARNER, ADMINISTRATOR OF THE ESTATE  
OF JOSEPH W. COLLIS, DECEASED, PLAINTIFF IN  
ERROR,

v.s.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

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IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF  
COLUMBIA.

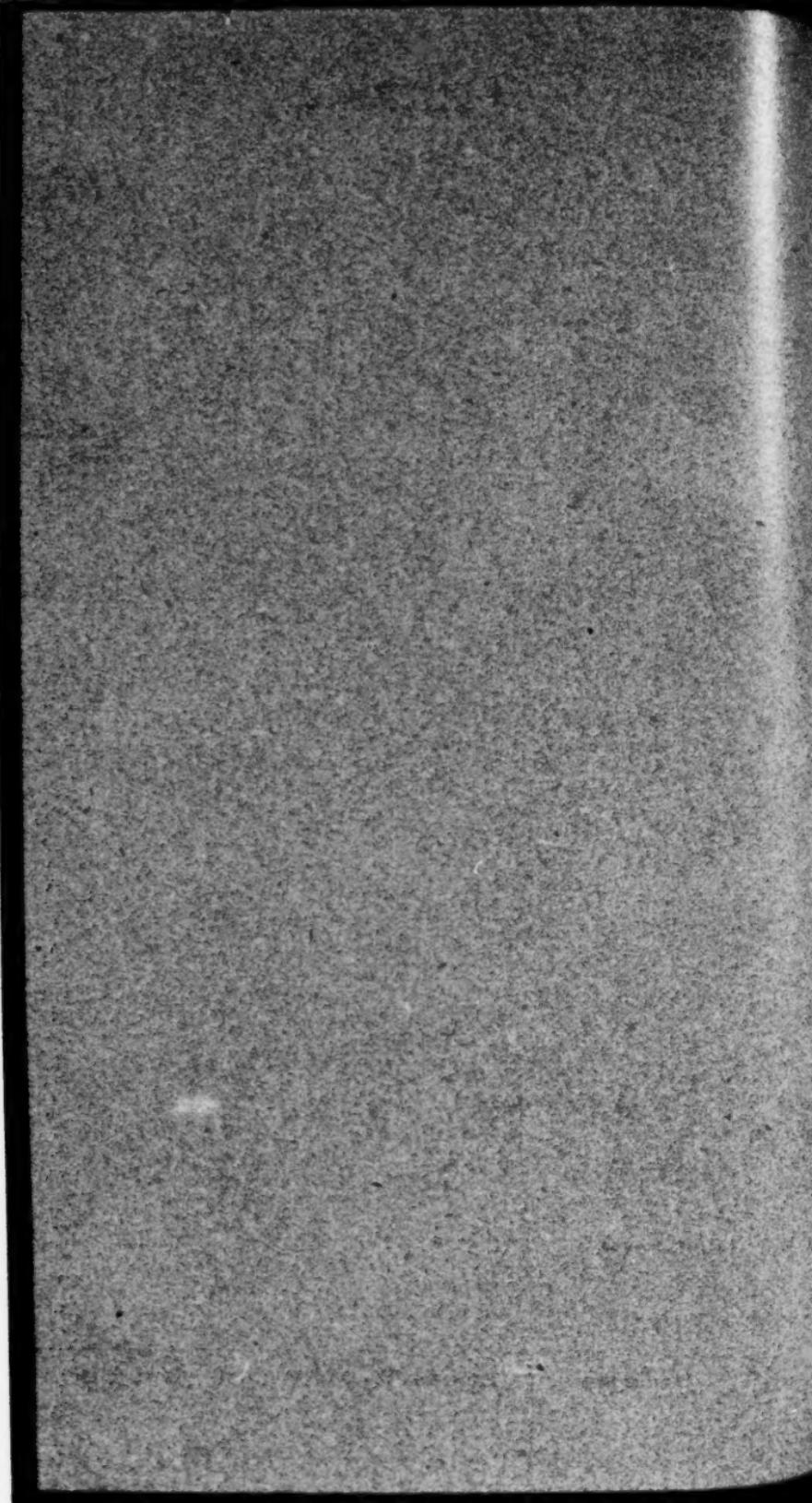
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FILED NOVEMBER 21, 1896.

(16,092.)

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(16,092.)

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print.
Caption .....	1	1
Transcript from the supreme court of the District of Columbia .....	1	1
Declaration .....	1	1
Notice to plead .....	5	5
Defendant's plea .....	5	5
Judgment .....	6	6
Entry of appeal and order for citation .....	6	6
Citation .....	6	6
Acceptance of service of citation .....	7	7
Note of filing appeal bond .....	7	7
Bill of exceptions .....	7	7
Testimony of Charles C. Hollidge .....	7	7
James E. Weeks .....	8	8
William H. White .....	9	9
Samuel B. Hege .....	9	9
William Shunberger .....	10	10
William H. White .....	11	10

## INDEX.

	Original.	Print.
Testimony of James E. Kelly.....	11	11
Wm. A. Collis.....	11	11
Mrs. James E. Kelly.....	11	11
Lawrence W. Burke.....	11	11
Charles C. Hollidge.....	11	11
C. W. Egan.....	12	11
John H. Stephens.....	12	12
James Perry.....	13	13
Samuel Reynolds.....	14	13
A. Turner.....	14	14
Bradford Worthington.....	14	14
Charles R. Lee.....	14	14
Morris Hampton.....	15	15
Charles A. Thompson.....	15	15
Isaac R. Hine.....	16	16
Charles W. Hughes.....	16	16
Thomas B. Queen.....	17	17
James A. Lewis.....	17	17
Wm. H. White.....	17	17
Columbus M. Lloyd.....	18	18
Mrs. Addie C. White.....	18	18
C. W. Egan.....	19	19
Judge's certificate to bill of exceptions.....	20	20
Clerk's certificate.....	20	20
Minute of argument.....	21	20
Opinion.....	22	21
Judgment.....	26	27
Order allowing writ of error.....	26	28
Bond on writ of error.....	27	28
Citation and acceptance of service of same.....	28	29
Writ of error.....	29	29
Clerk's certificate.....	30	30

1 In the Court of Appeals of the District of Columbia.

JOHN W. WARNER, Adm'r, &c., Appellant,  
 vs.  
 THE BALTO. & OHIO R. R. Co. } No. 452.

Supreme Court of the District of Columbia.

JOHN W. WARNER, Administrator of the Es-  
 tate of Joseph W. Collis, Deceased, Plain-  
 tiff,  
 vs.  
 THE BALTIMORE AND OHIO RAILROAD COM-  
 PANY, a Corporation, Defendant } At Law. No. 34474.

UNITED STATES OF AMERICA, {  
 District of Columbia, }  
 ss:

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

*Declaration.*

Filed July 13, 1893.

In the Supreme Court of the District of Columbia.

JOHN W. WARNER, Administrator of the  
 Estate of Joseph W. Collis, Deceased,  
 Plaintiff,  
 vs.  
 THE BALTIMORE AND OHIO RAILROAD COM-  
 PANY, a Corporation, Defendant } At Law. No. 34474.

The plaintiff, John W. Warner, to whom letters of administration have been duly and properly issued and granted by the orphans' court of Montgomery county, State of Maryland, upon the estate of Joseph W. Collis, deceased, late of the county of Montgomery, State of Maryland aforesaid, sues the defendant, The Baltimore and Ohio Railroad Company, a corporation having an agent conducting its business in the District of Columbia, for that heretofore, to wit, on the 22nd day of June, 1893, and within one year next immediately preceding the institution of this action, by an injury done

2 and happening within the limits of the District of Columbia the death of the said Joseph W. Collis was caused by the wrongful act, neglect, and default of the said defendant, which said wrongful act, neglect, and default was such as would, if the death of the said Joseph W. Collis had not ensued, entitle him to maintain

an action and recover damages against the said defendant; and thereupon the plaintiff says that heretofore, to wit, on the 22nd day of June, 1893, aforesaid, in the District of Columbia aforesaid, the said defendant, being a common carrier of passengers for hire, was running, controlling, managing, and operating a certain railroad having divers tracks thereof running and extending through the District of Columbia aforesaid, and then and there crossing divers public streets and highways of said District of Columbia at grade or on a level with the said public streets and highways of said District, and then and there it became and was the duty of the said defendant to properly guard, operate, manage, and control its said railroad crossing, and running over and through the public streets and highways of the District of Columbia aforesaid, so that persons lawfully using said streets and highways might be on and upon and use said streets and highways with safety; and whereas the said defendant, on the day and year last aforesaid, in the District of Columbia aforesaid, in the management, conduct, control, and operation of its said railroad was possessed of a certain locomotive engine propelled by steam, which said locomotive engine was then and there under the care, government, and control of certain agents, servants, and employees of said defendant, then and there acting within the scope of their employment, who were then and there driving or running the said locomotive engine on said railroad of said defendant, within the said District of Columbia, whereupon it then and there became and was the duty of the said defendant, its servants, agents, and employees aforesaid, to run, manage, and control the said locomotive engine on its said railroad in the District of Columbia aforesaid with proper and necessary care, caution, and diligence, and to move and run said engine on said railroad and over and across the said streets and highways crossed at grade as aforesaid with great care and caution, and it then and there became and was the duty of said defendant, its servants, agents, and employees, to give all proper, timely, and necessary signals, notices, and warnings of the approach to said crossings, streets, and highways of the said engine of said defendant, so that persons lawfully upon said streets and highways could there be and use the same with safety and be warned, guarded, and protected from danger and injury in and about crossing said railroad of said defendant at its intersection of said streets and highways at grade, as aforesaid, yet the said defendant, not regarding its duty in the premises, so negligently, carelessly, and improperly failed to guard, manage, and operate its said railroad, and so negligently, carelessly, and improperly ran, guided, managed, and controlled its said locomotive engine, and so negligently, carelessly, and improperly failed to give proper, timely, and necessary signals, notices, and warnings

3 of the approach to said crossings on said streets and highways of said engine of said defendant that by reason of the carelessness, negligence, and improper conduct of the defendant in the premises the said Joseph W. Collis, on the 22nd day of June, 1893, in the District of Columbia aforesaid, while lawfully on and upon the said streets and highways of the District of Columbia,

crossed at grade as aforesaid by the tracks of the said defendant, was, without any fault, negligence, or misconduct whatsoever on the part of the said Joseph W. Collis, struck and injured by defendant's locomotive engine aforesaid, then and there negligently, carelessly, and improperly run, managed, and controlled by the said defendant, its servants, agents, and employees, and by reason of the wrongful act, neglect, and default of the said defendant, its agents, servants, and employees aforesaid, the death of the said Joseph W. Collis was caused and did ensue from the injury then and there done and happening in the District of Columbia as aforesaid.

And the said Joseph W. Collis, whose death was caused as aforesaid, left him surviving his widow, Lucy E. Collis, and three children, to wit, two daughters and one son; and by reason of the premises and the statute in such cases made and provided an action for damages hath accrued to the said plaintiff, to wit, in the sum of ten thousand dollars (\$10,000), and therefore the plaintiff sues.

2nd. The plaintiff, John W. Warner, to whom letters of administration have been duly and properly issued and granted by the orphans' court of Montgomery county, State of Maryland, upon the estate of Joseph W. Collis, deceased, late of the county of Montgomery, State of Maryland aforesaid, sues the defendant, The Baltimore and Ohio Railroad Company, a corporation having an agent conducting its business in the District of Columbia, for that heretofore, to wit, on the 22nd day of June, 1893, and within one year next immediately preceding the institution of this action, by an injury done and happening within the limits of the District of Columbia, the death of the said Joseph W. Collis was caused by the wrongful act, neglect, and default of the said defendant, which said wrongful act, neglect, and default was such as would, if the death of the said Joseph W. Collis had not ensued, entitle him to maintain an action and recover damages against the said defendant; and thereupon the plaintiff says that heretofore, to wit, on the 22nd day of June, 1893, aforesaid, in the District of Columbia aforesaid, the said defendant, being a common carrier of passengers for hire, was running, controlling, managing, and operating a certain railroad having divers tracks thereof running and extending through the District of Columbia aforesaid and then and there crossing divers public streets and highways of said District of Columbia at grade or on a level with the said public streets and highways of said District, and then and there it became and was the duty of the said defendant to properly guard, operate, manage, and control its said railroad crossing and running over and through the public streets and highways of the District of Columbia aforesaid, so that persons lawfully using said streets and highways might be on and upon and use said streets and highways with

safety; and whereas the said defendant, on the day and year

4 last aforesaid, in the District of Columbia aforesaid, in the management, conduct, control, and operation of its said railroad, was possessed of a certain locomotive engine propelled by steam, which said locomotive engine was then and there under the care, government, and control of certain agents, servants, and em-

ployees of said defendant then and there acting within the scope of their employment, who were then and there driving or running the said locomotive engine on said railroad of said defendant within the said District of Columbia, whereupon it then and there became and was the duty of the said defendant, its servants, agents, and employees aforesaid, to run, manage, and control the said locomotive engine on its said railroad, in the District of Columbia aforesaid, with proper and necessary care, caution, and diligence, and to move and run said engine on said railroad and over and across the said streets and highways crossed at grade as aforesaid with great care and caution, and it then and there became and was the duty of said defendant, its servants, agents, and employees, to give all proper, timely, and necessary signals, notices, and warnings of the approach to said crossings, streets, and highways of the said engine of said defendant, so that persons lawfully upon said streets and highways could there be and use the same with safety and be warned, guarded, and protected from danger and injury in and about crossing said railroad of said defendant at its intersection of said streets and highways at grade as aforesaid, yet the said defendant, not regarding its duty in the premises, so negligently, carelessly, and improperly failed to guard, manage, and operate its said railroad, and so negligently, carelessly, and improperly ran, guided, managed, and controlled its said locomotive engine, and so negligently, carelessly, and improperly failed to give proper, timely, and necessary signals, notices, and warnings of the approach to said crossings on said streets and highways of said engine of said defendant that by reason of the carelessness, negligence, and improper conduct of the defendant in the premises the said Joseph W. Collis on the 22nd day of June, 1893, in the District of Columbia aforesaid, then and there being a passenger of said defendant and then and there being possessed of and having a certain ticket sold by said defendant to said Joseph W. Collis, by virtue of which said ticket the said Joseph W. Collis was then and there entitled to be carried by said defendant to the place of destination named and indicated on said ticket, the said Joseph W. Collis on the day and the year last aforesaid, while lawfully upon the said streets and highways crossed by said railroad at grade, in the District of Columbia aforesaid, at or near a certain place, depot, or station called and known as "University," said depot or station being then and there kept, maintained, and controlled by said defendant for the conduct of its business and the accommodation of its passengers, and being the depot or station where the said Joseph W. Collis properly was and whence he should leave, by virtue of the conditions and terms of his ticket aforesaid, the said Joseph W. Collis, then and there, while attempting with 5 all proper care, caution, and diligence to cross one of the defendant's said railroads, which it then and there was necessary and proper for the said Joseph W. Collis to cross in order to take passage on a certain other train of cars by said defendant owned, managed, and controlled, which said train of cars was then and there at said depot or station standing and waiting and being for

the reception of the said Joseph W. Collis and passengers going to the place of destination on said ticket indicated, was, without any fault, negligence, or misconduct whatsoever on the part of the said Joseph W. Collis, struck and injured by defendant's locomotive engine aforesaid, then and there negligently, carelessly, and improperly run, managed, and controlled by the said defendant, its servants, agents, and employees; and by reason of the wrongful act, neglect, and default of the said defendant, its agents, servants, and employees aforesaid, the death of the said Joseph W. Collis was caused and did ensue from the injury then and there done and happening in the District of Columbia as aforesaid.

And the said Joseph W. Collis, whose death was caused as aforesaid, left him surviving his widow, Lucy E. Collis, and three children, to wit, two daughters and one son; and by reason of the premises and the statute in such cases made and provided an action for damages hath accrued to the said plaintiff, to wit, in the sum of ten thousand dollars (\$10,000), and therefore the plaintiff sues.

RODOLPHE CLAUGHTON,  
*Attorney for Plaintiff.*

*Notice to Plead.*

The defendant, The Baltimore and Ohio Railroad Company, is to plead hereto on or before the first day of the first special term of the court occurring twenty days after service hereof; otherwise judgment.

RODOLPHE CLAUGHTON,  
*Attorney for Plaintiff.*

*Defendant's Plea.*

Filed August 31, 1893.

In the Supreme Court of the District of Columbia.

JOHN W. WARNER, Administrator of the }	At Law. No. 34474.
Estate of Joseph W. Collis, Deceased,	
vs.	
THE BALTIMORE AND OHIO RAILROAD CO.	

For plea to the declaration filed in the above-entitled cause the defendant says that it is not guilty as alleged.

HAMILTON & COLBERT,  
*Attorneys for Defendant.*

SATURDAY, March 9th, 1895.

6 Session resumed pursuant to adjournment, Mr. Justice Bradley presiding.

\* \* \* \* \*

JOHN W. WARNER, Administrator of the Estate of Joseph W. Collis, Deceased,  
Plaintiff,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant,

At Law. No. 34474.

This case coming on to be heard upon the plaintiff's motion for a new trial, and the same having been heard, is overruled. Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff its costs of defense, to be taxed by the clerk, and have execution thereof.

*Entry of Appeal & Order for Citation.*

Filed March 11, 1895.

In the Supreme Court of the District of Columbia.

JOHN W. WARNER, Adm'r, Plff,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, Def'd't.

At Law. No. 34474.

The clerk of said court will please enter an appeal to the Court of Appeals of the District of Columbia by above-named plaintiff from the judgment of said supreme court, entered in above-entitled cause on the 9th day of March, 1895, and cause citation to be issued to defendant (appellee) herein.

RODOLPHE CLAUGHTON,  
*Att'y for Appellant.*

In the Supreme Court of the District of Columbia.

JOHN W. WARNER, Administrator of the Es-  
tate of Joseph W. Collis, Deceased,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

At Law. No. 34474.

The President of the United States to the Baltimore and Ohio Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant

to an appeal filed in the supreme court of the District of

7 Columbia on the 11 day of March, 1895, wherein John W.

Warner, administrator of the estate of Joseph W. Collis, deceased, is appellant and you are appellee, to show cause, if any there be, why the judgment decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

THE BALTIMORE & OHIO RAILROAD CO.

Seal Supreme Court  
of the District of  
Columbia.

Witness the Honorable Edward F. Birmingham, chief justice of the supreme court of the District of Columbia, this 11 day of March, in the year of our Lord one thousand eight hundred and ninety-five.

JOHN R. YOUNG, Clerk.

Service of the above citation accepted this 11 day of March, 1895.

HAMILTON & COLBERT,  
*Attorneys for Appellee.*

(Endorsed:) No. 34474. Law. John W. Warner, adm'r, vs. Baltimore and Ohio Railroad Co. Citation. Issued M'ch 11, 1895. Served cop- of the within citation on \_\_\_\_\_. — — —, marshal. R. Claughton, attorney for appellant.

1895, M'ch 25.—Bond for appeal filed.

*Bill of Exception.*

Filed April 1, 1895.

In the Supreme Court of the District of Columbia.

JOHN W. WARNER, Administrator of Joseph W. Collis, Deceased, Plaintiff }  
vs. } At Law. No. 34474.  
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant. }

Be it remembered that this cause came on for trial before the Honorable Andrew C. Bradley, the presiding justice, and a jury on the 8th day of February, 1895.

Whereupon the plaintiff, to maintain the issues on his part joined, proved that at the time of the accident mentioned in the declaration the defendant was a common carrier of passengers for hire, was a corporation, and that John W. Warner was the duly appointed administrator of Joseph W. Collis, deceased.

Thereupon the plaintiff called as a witness CHARLES C. HOLLIDGE, who, being duly sworn, testified that he lived at Brookland, and had lived there for six years; that on June 22nd, 1893, he was not employed, but was living at Brookland; that the tracks of the defendant divided Brookland from University station; about 9 o'clock on the morning of June 22, 1893, he was standing in a field about two squares from his house; that he was just through cleaning off a horse; at the moment he was not doing anything; that he heard the express train whistle and had finished cleaning the horse two or three minutes before that; that he was in the habit of observing trains which passed University station; that he was about three squares and a half from the whistle post; that his hearing and vision were good; that the first intimation he had

of the express train was the whistle, which was a long, screeching, very shrill whistle; that the whistle generally blew three times, but he did not hear the three-time whistle that morning; that he did not hear the express train ring any bell; that it was going about 40 or 45 miles an hour; that he went to the station about two minutes after the train passed and there saw Mr. Collis, who died a few minutes after he was struck.

On cross-examination the witness testified that he was in the habit of gauging time by the passage of trains; that at the time the express train passed he was about two squares from the station; that the express train began to whistle about 150 feet from the station; that it had been whistling about a half minute; that it started to whistle when it was about 150 feet from the station; he could not say positively that it was whistling a half minute before it reached the station; that he did not see the accident.

On redirect examination the witness stated that when he heard the whistle he looked up; that when he looked up the last car was about 50 feet from the station and he just saw it pass by; the time was a little after 9 o'clock in the morning.

Thereupon the plaintiff called as a witness JAMES E. WEEKS, who testified that on the morning of the accident he was on one of the defendant's trains at University station, going north, and sitting on the west side of the car; that his hearing and vision were good; that when his train came to a stop he saw two gentlemen at the south end of the depot building; one of them started to walk up the platform and the other went down; one of them approached the train in which he was sitting; when he started to approach the train the local train was at a stand-still, and the person he observed was then about 12 feet away from him; at that time his attention was attracted by the danger signal of an approaching train, which was a shrill, sharp blast, blowing in quick succession; as soon as he heard the blast witness raised his eyes and the train was then about 40 or 50 feet off; it did not stop at University, and did not stop at all so far as witness could see; at that point there is a gradual curve; the next thing that witness noticed was that the train struck this man; that the whistle post is about four or five hundred yards north of University station; that the car in which witness was seated was standing at the station; that there was no whistle blown by the express train, except the danger whistle, and no bell was rung; the first intimation he had of the approach of the express train was the danger signal; the express train was going from

40 to 45 miles an hour; there is a plank walk leading from 9 the station to the other side; that walk starts about the center of the depot and goes straight across to the other platform; the person he saw started on the plank walk and then cut across a little diagonally from his course so as to get on the car which witness supposed he was going to take; he was just off the end of the plank when he was struck; he walked on that board walk until he was deflected by the line of this car; he was either going to get on the forward car or the middle car, one or the other; if he had gone

straight across it would have brought him to the car about four feet from the platform.

On cross-examination the witness stated that he was in the middle coach of the train and saw this gentleman whom he was afterwards told was Mr. Collis on the platform; that he did not see the express train until he heard it whistle; that so far as he knew there was nothing to obstruct Mr. Collis' view up the track. He was seated almost opposite Collis. The witness supposed that Collis would have had a clear view up the track if he had looked; that there was no obstruction between Collis and the express train so far as witness knew. Collis seemed about to get on the train on which witness was seated on the side nearest to him; that he had approached the car and would have gotten on from the side nearest to the other track. He walked on the plank walk part of the way, and then turned diagonally towards the platform of the car. When the express train blew he was nearly across the tracks. When the express train blew it was 40 or 50 feet from him. The distance between the rails of each track is about five feet. Standing on the platform at University station and looking north, a person can see between a quarter and a half mile.

Thereupon WILLIAM H. WHITE was called as a witness by the plaintiff, and testified that on the day of the accident he was employed as gate watchman at University station and went on duty at six o'clock in the morning; that he first saw Mr. Collis at 7.20 in the morning when he got off the train at University station; that that train was scheduled to stop at Forest Glen on its way to Washington. After Collis arrived he went to West Brookland, which is west of the tracks.

On cross-examination he stated that he again saw Mr. Collis at University station about 8.30, but that he did not see him struck. He last saw him under the arch of the station. He was then standing talking to several persons. Witness did not see the accident at all.

On redirect examination the witness stated that at the time the express train which struck Collis passed an accommodation train was at University station; it was about stopping.

The plaintiff then called as a witness SAMUEL B. HEGE, who stated that he was employed by the Baltimore and Ohio Railroad Company as district passenger agent, and had been living at Rockville six or seven years. He had been employed by them for a number of years; that his business as well as his residence at Rockville

rendered him familiar with the movement of trains in a  
10 measure between Rockville and Washington; that he had been in his present business four years, and had lived at Rockville for six years; that he came over the road every day; that he knew University station; that there was a double-track system there, operated by the Baltimore and Ohio railroad. On June 22nd, 1893, the witness White was ticket agent at said station, and the company was selling round-trip or 30-day tickets from Forest Glen

to University; the return coupon would ordinarily be held by the passenger until he got on the train to take the journey back.

Thereupon counsel for the plaintiff tendered the witness a ticket, which he identified as a ticket issued by the Baltimore and Ohio.

It read as follows: "Baltimore & Ohio railroad. Round-trip ticket. Good only for one continuous passage University to Forest Glen, Maryland. In consideration of the reduced rate at which this ticket is sold it is distinctly understood and agreed by the purchaser that it will be absolutely forfeited if not used within thirty days, including day of sale, as stamped on the back." The date stamped on the back was June 21, 1893. The ticket was in force on the 22nd of June. University station was the proper place for a person to start from with that ticket. The witness further testified that the ticket agents at the various ticket offices are always promptly informed of any changes in the movement of trains. On the 22nd of June, 1893, there was an express train which left Hagerstown, passing Rockville and going to Washington, which left Rockville about 48 minutes after 8. It reached Washington about 9.15 or 9.20. Rockville is about 16 miles and a fraction from Washington. The shortest time made by any express train between Rockville and Washington is about 28 minutes. On June 22nd, 1893, the first train leaving Washington and going up the Metropolitan branch left about 9.30 in the morning. Witness is not clear on the point whether there was a train at 9 in the morning. Local trains leaving Washington always stopped at University station. It took trains about from 9 to 11 minutes to run from Washington to University station. They stopped there for the purpose of taking on and discharging passengers. The express trains coming towards Washington used the west track and the local trains going out from Washington used the east track. The station at University is west of both tracks, and passengers would have to cross the tracks to take the north-bound train.

Thereupon the plaintiff called as a witness WILLIAM SHUNBERGER, who, being duly sworn, testified that on the day of the accident to Mr. Collis he was manager of the morgue in the District of Columbia; that Mr. Collis' body was brought to the morgue between 10 and 11 o'clock. The witness thereupon identified the pocket-book found on the person of the deceased, which contained the return portion of the round-trip ticket identified by the witness Hege.

11 Thereupon plaintiff recalled WILLIAM H. WHITE, who testified that he was employed by the Baltimore and Ohio Railroad Company on June 22, 1893; that while so employed he received a book of the rules of the company, and he identified the book, which was thereupon offered in evidence, and which contained the following rule: "No. 441. When one passenger train is standing at a station receiving or discharging passengers on double track no other train, either passenger or freight, will attempt to run past until the passenger train at the station has moved on or signal is given by the conductor of the standing train for them to come

ahead, and the whistle must not be sounded while passing a passenger train on double track or sidings unless it is absolutely necessary."

Thereupon plaintiff called as a witness JAMES E. KELLY, who testified that he came to Washington on the morning of the accident in response to a telegram from one of the Baltimore and Ohio railroad officials; that he came to Washington and went to the morgue, and there received from the keeper of the morgue the purse containing the ticket heretofore offered in evidence.

Thereupon the plaintiff called as a witness WILLIAM A. COLLIS, who testified that he was a son of the deceased; that his father had three children—two married daughters and the witness, who was 19 years old; that the deceased was a little more than 46 years old at the time he was killed; that the witness—not living home. He was living with his brother-in-law.

Thereupon plaintiff called as a witness Mrs. JAMES E. KELLY, who testified that she was a daughter of the deceased. He was a carpenter, and was 55 years old at the time of his death; that in June, 1893, Mr. Collis and his wife were living in the same house with the witness; that the wife of the decedent was 46 years old, the witness was 24 years old, her sister 19, and the boy 15 at the time of the accident; that her father's health was always good, and he always provided for his family.

Thereupon plaintiff called as a witness LAWRENCE W. BURKE, who testified that he was a carpenter and builder; that he saw the deceased on the 22nd of June, 1893, at West Brookland, D. C., and witness told Collis that he would give him employment on the following Monday. Witness further testified that the earning capacity of the average carpenter was about \$750.00 a year.

And thereupon the plaintiff recalled CHARLES C. HOLLIDGE, who testified that at the time of the accident he was attracted by the danger signal of the express train, and looked up, and at the moment he looked up he saw the rear car passing, and the rear car was between 150 and 200 feet from University station.

On cross-examination the witness testified that he did not know where the engine was when he looked up; that he only saw the last car on the train; that he did not know whether the engine had reached Brookland station; he only saw the rear car of the train, because there was a house between him and the station which cut off the view of the rest of the train.

Thereupon the plaintiff rested his case; and the defendant, to maintain the issues on its part joined, offered as a witness C. W. EGAN, who identified several photographs made by him in the scene which accurately represented the situation of things at University station on the 22nd of June, 1893, and which photographs were

offered in evidence. The witness further identified a map prepared by him from actual survey, which map was drawn to a scale, and which map was offered in evidence. Standing on the edge of the platform at University station, the view was unobstructed for one mile and four-tenths. There was a train indicated on the photograph, which was at Terra Cotta station, nearly a mile away. There was a platform connecting the east and west platforms. The distance between the rails of each track was 4 feet 8 $\frac{1}{2}$  inches, and the distance between the two tracks was 7 feet 5 inches. The whistling post was 16 hundred feet north of University station.

On cross-examination the witness testified that there was a whistling post 1,600 feet north of University station, where trains whistle for the station. After passing that point and within 600 feet from the station it blows for the crossing two short and two long blasts. That is an alarm whistle for crossings. The crossing is south of University station and is the Bunker Hill road crossing. The brick yards are not an obstruction to the view looking north from University station, because they are not on the right-of-way limits. The witness further testified that the right of way of the company at that point was 140 feet, 70 feet on each side of the center line, and within that stretch of 140 feet there was no obstruction to interfere with the view of the tracks.

Thereupon the defendant called as a witness JOHN H. STEPHENS, who testified that he had been an engineer on passenger trains since 1872; that he was the engineer of the express train which struck and killed Mr. Collis; the train left Hagerstown at 6.30 in the morning and was due in Washington at 9.20; that he reached University station on time, but was 7 or 8 minutes late getting into Washington by reason of this accident; that as he passed University station he was running about 40 miles an hour, which was about schedule speed; that on this morning when he reached the whistling post he blew a long blast; that after he got by the whistling post he saw Mr. Collis standing on the platform, but did not think that Collis would go over. The witness further stated that just before he got to him, when the engine was 60 or 70 feet from him, Collis started across, and the very instant that he started across witness blew the danger signal, 4 or 5 short blasts, and Collis still kept on. While witness was blowing the whistle with his right

hand he put the air brakes on with his left, but the left side  
13 of the engine struck the man. Witness testified that he did

all that lay in his power to stop, but could not stop until he had gone about 350 or 400 yards beyond the station; he then stopped and backed his engine back. When he was going down towards University station on that morning when he blew the station whistle he did not see the local train, but it was coming up. When the express passed University station witness was not certain whether the local train had stopped or not, but if it had not stopped it was very nearly so. He did not see the local train until he blew the whistle for the station. Witness further testified that he first saw Mr. Collis when he was standing on the platform; then he

started to go across, and when witness saw that he could not get across he commenced blowing the danger signal and the fireman commenced ringing the bell. He did not go straight across, but was walking obliquely—sort of sideways—with more of his back to me than his face. One more step would have put him over.

On cross-examination witness testified that coming down towards University station he saw the local train. He don't know whether it was moving or had stopped entirely. He knew its various places of stopping; that he did not know whether the local train was going to stop or not, for the reason that when they did not have any passengers they did not stop—that is, if there is no one to get on or off; that he saw one man get off the train, but saw nobody else at the station waiting to get on besides Mr. Collis; that he knew the train coming up was an accommodation train; that people did not get on from the west side of the local train, but they got on on the east side. On the express train on that occasion there were two coaches, a combination car, engine, and tender. The coaches and car were each about 60 or 65 feet long; the tender was about 20 or 25 feet long; the engine proper was about 15 or 20 feet long. The floor of the cab on the engine is 4½ or 5 feet from the ground; the cab is 8 or 9 feet wide. Witness further states that he did not see Mr. Collis struck, as he passed out of view in crossing over the tracks. Witness further testified that the only whistle blown by him was a long blast at the whistling post and the danger signal, which was blown when he was 60 or 70 feet away. Witness further stated that he knew there was such a rule in the book as rule No. 441, but it was impossible to carry out the rule and make schedule time, and that the rule never was carried out. The rule was in the book, but it was never carried out. When witness whistled at the whistling post he did not see the local train coming, because it was around the curve. Witness further testified that the express train was due at University station at 9.11 and the local train was due at 9.09.

Thereupon the defendant called as a witness JAMES PERRY, who testified that he was the engineer of the local train on the occasion of the accident to Mr. Collis; that he usually passed the express train at University station or a little beyond; that he was on time on that morning; that he was in the act of stopping when the express train passed. He had not stopped, but was just easing along slow to give the express a chance to get by, because 14 people get off on the track. He did not see Mr. Collis at all. The local train had not stopped, because witness had often noticed that a good many people would jump on the wrong track, and he was just easing along slowly to keep people from getting in the way. He heard the express train blow the danger signal when he was 50 or 70 feet from the station. He had not heard any whistle before that.

Thereupon the defendant called as a witness SAMUEL REYNOLDS, who testified that he was the fireman of the express train which

struck Mr. Collis; that the engineer blew the whistle at the whistling post; that he heard nothing more until he heard the danger signal blow. Witness was shoveling coal in at the time, and when he heard the whistle blow he dropped the shovel and grabbed the bell; the next he saw was a man running across and hit; the engine was then about 60 or 70 feet from him; the engineer did all he could to stop; he shut his valve off and put on the air. Mr. Collis had his left side towards the express train; the front bumper on the left side of the engine struck him and he was thrown between the tracks. North of University station there is nothing to prevent a person from seeing a mile up the track that morning. From Rockville to Washington the grade is down. The express train was running about 40 miles an hour.

Thereupon the *plaintiff* called as a witness A. TURNER, who testified that he was a conductor on the express train that struck Mr. Collis; he was in the rear car; that he heard the engine blow when it was about at the whistle post, about 1,500 feet from the station. Soon after, when the train was about 60 feet from the station, he heard a succession of blasts, which was the danger signal, and at the same time felt the air applied. The train ran between 350 and 400 yards below the station before it stopped.

Thereupon the defendant called as a witness BRADFORD WORTHINGTON, who testified that he was the baggagemaster on the train that struck Mr. Collis; that he heard the engineer blow for University station, but how far north of the station he did not know; shortly after that he heard the danger signal blown and he felt the air put on.

On cross-examination the witness testified that he did not know where the engine was when the engineer blew for the station, but thinks that in the interval of time between the first signal and the danger signal the train might have run 1,200 feet or a little further; as near as he could tell, it had run about 1,200 or 1,500 feet.

CHARLES R. LEE was thereupon called by the defendant as a witness and testified that he was the fireman on the local train going north on the morning that Mr. Collis was killed; he was on the left-hand side of the engine and saw Mr. Collis struck; his train

was due at University at 9:09; the witness could not say 15 whether he was on time or not; the train might have been a few minutes late; when the express train was coming around the curve witness saw the engineer blow for the crossing, and then after he left Terra Cotta he heard him blow for the station; witness was standing in the cab talking to the engineer when he heard the danger signal and saw a man knocked against the side of the local train; the local train was just slowing up and had not come to a stand-still; the witness was positive that he heard the whistle blow.

On cross-examination witness testified that he heard three whistles blow, two long blasts and two short ones, for the crossing, one

for the station and 4 or 5 blasts in rapid succession for the danger signal.

Thereupon the defendant called as a witness MORRIS HAMPTON, who testified that he was a machinist employed by defendant; that he was on the local train on the morning of the accident to Mr. Collis, on the left-hand side, sitting about midway the coach. He saw Mr. Collis standing on the platform and heard the express train when it blew for the station. He watched Mr. Collis to see if he was going to come across. He stepped down off the platform and crossed over the track. Witness then heard the express train blow the danger signal and put his head out of the window and watched the decedent. He crossed over and got on the outside rail and turned his back towards the express and started up the track and the express train hit him. When witness put his head out of the window the express train was only 30 or 40 feet away from Mr. Collis. Collis did not go straight across. He went across until he got on the outside rail near the middle of the track and turned his back towards the engine. He did not make more than two steps when the engine struck him. The witness was sure that he heard the express train blow for the station.

Thereupon the defendant called as a witness CHARLES A. THOMPSON, who testified that he was a passenger on the local train on the morning of the accident, sitting on the left-hand side. He saw the accident. He heard the express train blow for the station, and shortly after that heard the danger signal blow. He threw his head out of the window and looked at the crossing, turned back and saw a man put his foot off the platform and onto the track. Witness watched him, and he walked across to get on the end of the ties on the other side of the west track, turned around and came towards where witness was sitting on the ties, when the express train struck him in the back and threw him against the place at which witness was sitting; witness thought his body would come in through the window; the express train was not more than 40 feet away from Mr. Collis when he put his foot on the west rail of the west track; it was not possible to stop the train; when Collis put his foot on the west rail of the west track the local train had not come to a stop; the local train was moving slowly; the local train ran about half a car-length after Collis was struck.

On cross-examination witness testified that as soon as the  
16 danger signal was blown he put his head out of the window; he was seated in the last coach of the local train; that he was going to Garrett Park, which was several stations beyond University; he was putting in some machinery at Garrett Park. Witness heard the engineer blow the station whistle and then the danger signal; he heard two short and two long blasts, and after that the danger signal, which was a succession of short blasts; the train ran about 12 or 15 hundred feet after blowing the station whistle before the danger signal was blown; witness did not know

whether the station whistle was blown 600 feet north of the station or 1,500 feet north.

Thereupon the defendant called as a witness ISAAC R. HINE, who testified that he was coming down on the express train on the morning of the accident, seated on the left-hand side, and saw the local train when he passed; that he was a passenger and was seated in the smoking car; that he heard the whistle blow for University station; then he heard the danger signal.

On cross-examination witness testified that he did not see Mr. Collis struck. As soon as the danger signal blew he jumped up and ran to the window, but could not see anything. The first signal blown was a long blast for the station. The whistle post was located between 1,500 and 1,600 feet north of the station. The train was near the whistle post on this morning when the engine blew for the station; that he was by occupation a bridge-inspector on the Baltimore and Ohio railroad.

On redirect examination the witness testified that after his train passed University station it stopped and came back.

Thereupon the defendant called as a witness CHARLES W. HUGHES, who testified that he was a mail clerk employed by the United States and was on the express train that struck the deceased; he was on his way home, going to Baltimore by way of Washington; that he had no interest in the pending suit; that on the morning of the accident he was sitting in the last seat in the last coach, with the window up, and as the express train passed Terra Cotta station he looked out of the window and had his head out all the way down until he passed University station. When the engineer was at the whistle post he blew one long blast and a few seconds later he blew the danger signal. Witness saw the man on the platform, saw him get down on the track, but thought he had gotten over. Immediately after the danger signal was blown the witness felt the air applied, and the train stopped as soon as it could and came back. Witness got off the train and saw that the man was dead. When Mr. Collis stepped off the platform on the track the engine was about 60 or 70 feet from him. It was not possible to stop the train in time to avoid hitting him. The train was running about 40 miles an hour, which was the usual rate of speed for that train. Mr. Collis went over the track obliquely, with his left side towards the train. Witness did not see the local train until he passed it. He did not know whether it was moving or not.

On cross-examination the witness testified that he was on 17 the left-hand side; that he heard the engineer blow at the whistle post because he was looking out the window and saw when the engineer passed it; the interval between the first signal and the danger signal was only a few seconds; he noticed only two signals; the whistle post is on the left-hand side of the track coming towards Washington, on the same side that the witness was seated; he was on the same side with the station, which was on the right

side of the train instead of the left, as the witness had previously stated.

Thereupon the defendant called as a witness THOMAS B. QUEEN, who testified that he was a merchant and was on the express train the morning of the accident; that he heard the whistle blow for University station; it was blown somewhere near Terra Cotta station; the first whistle was a long blast and then the danger signal; only a very short time intervened between the first whistle and the danger signal; the train travelled some hundred feet in that time; the witness was sure about the blowing of the two whistles.

On cross-examination the witness testified that Terra Cotta was the next station north of University; he thought Terra Cotta was nearer the university than the whistle post was.

Thereupon the defendant called as a witness JAMES A. LEWIS, who testified that he was a student attending school, but on the day of the accident was a news agent travelling on the Baltimore and Ohio between Baltimore and Hagerstown; that he was on the express train on June 22, 1893, in the rear seat of the smoking car, on the left-hand side coming down; that he saw nothing of the accident except the body of the man rolling as the express passed the other train; coming down he heard the express train first blow a long blast, longer than is usually blown at other stations, because the express did not stop at that station; a very short time intervened between the first blast and the danger signal, which was a succession of 4 or 5 blasts; the witness said he could not be mistaken about these two whistles.

On cross-examination the witness testified that he had been travelling on that train for a year and six months every day except Sundays; that he missed only three days in a year and a half; that he could not positively state where the train was when it blew the first whistle, but that a short time intervened between the first whistle and the second; that he did not hear any whistles but those two.

Thereupon the defendant called as a witness WILLIAM H. WHITE, who testified that on the morning of the accident he was the gate-man at the crossing just below University station; that the express train blew the first time at the brick yard, which was 4 or 5 or 6 hundred yards north of the station; that the brick yard was between the whistle post and the station; that it is only about 300 yards from the station to the brick yard; that signal was the long blast. The next that witness heard was when the train was  
18 ten or twelve feet above the station it blew the danger signal, two or three blasts.

On cross examination the witness stated that when the train was at the brick yard he heard the first whistle. The brick yard is some distance below the whistle post; that the brick yard is 700 or 800 feet nearer the station than the whistle post.

Thereupon the defendant called as a witness COLUMBUS M. LLOYD, who testified that on the morning of the accident to Mr. Collis he was a brakeman on the local train going west; that he was on the left-hand side of the train, in the rear car; that the window was up; that he heard the express train blowing the danger signal; that he looked out of the window and saw a gentleman step down on the track and start across towards the west-bound track. If he had gone back witness thinks he would have been saved, but he did not go back; he kept on. At that time the engine was about 10 or 15 feet west of the platform. The platform extends about 30 feet west of about where he started to cross the track, so that he was 40 or 45 feet from the train when he started on the track; that he did not hear any whistles blow besides the danger signal. In fact he had not been noticing whistles. When witness heard the danger signal the rear car of the train he was on was going over the crossing. The local train was still moving when the danger signal blew. He saw Mr. Collis struck. He was not going straight across the track, but was going more with his face towards the road crossing, with his side and back towards the west-bound track. He was not walking on the plank walk that connected the two platforms, but was 8 or 10 feet east of that crossing.

On cross-examination the witness testified that when he first saw Mr. Collis he was stepping down on the track off the platform; that he never noticed him until the express train blew the danger signal. Then witness looked out and saw him. He was just stepping down, and the next step the train hit him. He had stepped down on the track and was making his step over the second rail. He had gone over one rail and was making his step over the second rail when the train hit him on the left side. His head went back and struck the bumper of the engine. He appeared to be coming towards the local train. The local train had not stopped when he started to cross. The first that witness saw of him was that he was off the board platform.

Thereupon the defendant called as a witness MRS. ADDIE C. WHITE, who, being duly sworn, testified that she resided in Brookland and witnessed the death of Mr. Collis; that she was standing on her porch about 50 or 100 feet from the station; that she saw Mr. Collis come over and run in front of the express train; that she heard the express train blow a long blast. It was at the brick yard when it gave the long blast. After that she next heard four distress whistles, which were short, sharp blasts. Mr. Collis was sitting

behind the arch, and when he heard the train coming up he 19 started from under the arch and started around to cross the track and get on his train. The local train was then moving, and the express train was about 50 feet away. He started straight across, and when he got nearly to the outside rail the train struck him. He did not stop at all and did not look in either direction. His side was towards the express train. He was running, and at the time the local train was still moving up towards the station.

On cross-examination the witness testified that she could not tell whether Mr. Collis heard the express train blow or not, but witness heard it blow and she did not see why he could not hear it, for there was no other noise except the trains ; that the express train first blew at the brick yard, and at that time the local train was almost ready to stop. A short time intervened between that whistle and the danger signal, because it is not very far from the brick yard to University station. That she was standing on her porch, about 50 or 100 feet from the station, right across the road. There was nothing in the way of obstruction that prevented her from having a full view of Mr. Collis. Witness further stated that she was in her hall sewing, and she went to the window and looked out, as she always did when she saw trains coming to see who got off and on ; she knew the express train did not stop, but knew that the accommodation was coming up ; that she saw a lady and a child get on the local train ; that she saw Mr. Collis when the engine hit him ; that she heard the local train blow a long blast for the station ; then she got up and went out on the porch ; when she heard the local train coming she got up and went out ; when she was looking at the local train she heard the express train blow at the brick yard ; then in a short time she heard the danger signal, but no other signal. The witness could distinguish the different sounds produced by the whistles on the local train and the express train. Witness further stated that she heard the local train whistle down below the station and the express train whistle up in the other direction, and that she could hear them both. Her residence was on the right-hand side of the tracks coming to Washington ; that she was facing the station, west of the western track.

Thereupon the defendant recalled C. W. EGAN, who testified that the brick yards are between fifteen and sixteen hundred feet north of University station.

On cross-examination the witness stated that the brick yards are opposite the whistle post. The witness further testified that he heard several of the witnesses state that the brick yard was not so far up as the whistle post, but he stated that other witnesses did not measure it, but he did, and made the survey.

And thereupon counsel on both sides announced their testimony closed.

And thereupon the defendant, by its attorneys, moved the court, on all the evidence, to direct a verdict in favor of the defendant ; which motion was granted by the court and a verdict, by 20 order of the court, was returned by the jury in favor of the defendant ; to the granting of which said motion by the court, directing the jury to return a verdict in favor of the defendant, the plaintiff duly excepted and the exception was noted on the minutes of the court ; and the plaintiff, by his attorney, requests the justice presiding to sign, seal, and enroll and make a part of the record

the plaintiff's bill of exception, and it is accordingly done, now for  
then, this first day of April, A. D. 1895.

### Settled by consent

A. C. BRADLEY, *Justice.* [SEAL.]

RODOLPHE CLAUGHTON

THE CHAUGI  
Att'y for Plaintiff

G. E. HAMILTON

G. L. HAMILTON  
M. J. COLBERT

**COLEBROOK,**  
*Att'ys for Defendant*

Supreme Court of the District of Columbia

UNITED STATES OF AMERICA, }  
District of Columbia. } 88:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 34, inclusive, to be true copies of originals in cause No. 34474, at law, wherein John W. Warner, administrator of the estate of Joseph W. Collins, deceased, is plaintiff and The Baltimore and Ohio Railroad Company, a corporation, is defendant, as the same remain upon the files and records of said court.

Seal Supreme Court  
of the District of  
Columbia.

In testimony whereof I hereunto subscribe  
my name and affix the seal of said court, at  
the city of Washington, in said District, this  
8th day of April, A. D. 1895.

JOHN R. YOUNG, Clerk

Endorsed on cover: District of Columbia supreme court. No. 452. John W. Warner, adm'r, &c., appellant, vs. The Balto. & Ohio R. R. Co. Court of Appeals, District of Columbia. Filed Apr. 9, 1895. Robert Willett, clerk.

TUESDAY, May 14th, A. D. 1895.

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U. W. — A. J. S.

De

JOHN W. WARNER, Administrator of the Estate of Joseph W. Collis, Deceased, Appellant,  
vs.  
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 452.

The argument in the above-entitled cause was commenced by Mr. Rodolphe Claughton, attorney for the appellant, and was continued by Mr. M. J. Colbert, attorney for the appellee, and was concluded by Mr. Rodolphe Claughton, attorney for the appellant.

22 JOHN W. WARNER, Administrator of the Estate of }  
of Joseph W. Collis, Deceased, Appellant, } No. 452.  
vs.  
THE BALTIMORE AND OHIO RAILROAD COMPANY. }

*Opinion of Court.*

Mr. Justice MORRIS delivered the opinion of the court:

This is a suit to recover damages for the alleged unlawful killing of the appellant's intestate through the negligence of the agents and employees of the appellee. On the morning of June 22, 1893, Joseph W. Collis was struck and instantly killed on the track of the Baltimore and Ohio Railroad Company at a small station just north of the city of Washington known as University station, by the engine of an express train of that company coming from the northwest in the direction of Washington, while he was apparently engaged in an attempt to board another train of the same company, an accommodation train standing or slowly moving upon the adjacent track and which was bound in the opposite direction. It appears that on the day before he had purchased what is known as a round-trip ticket, good for thirty days, by the coupon of which, found upon his person after his death, he was entitled to be conveyed from University station to a neighboring station north of it known as Forest Glen. At University station there is a double track running for about a mile or upwards in a straight direction nearly due north and south, and with an uninterrupted view of the road for that distance towards the north. The western track is used for trains moving towards Washington from the north and west, the eastern track for trains going north and west from Washington. On the west side of the road is the ticket office, with a platform around it more or less covered. On the east side is a smaller uncovered platform. About 1,600 feet to the north of the station is a post where it is usual to sound the whistles of engines coming south on the western track, so as to give timely notice of their approach at University station.

About 9 o'clock of the morning of June 22, 1893, the accommodation train referred to had come out from Washington, and either had stopped or was about to stop at University station; for the testimony is conflicting as to whether it had actually come to a stop; and it does not appear whether, when it did come to a stop, any passenger disembarked, or that there was any other person than the deceased to board the train. It is presumed that Collis desired to take the train in order to be conveyed to Forest Glen. He had been seen standing for some time on the western platform; and as the train which he seemed desirous to take came into the station, he started to cross a plank walk which connected the two platforms, presumably so as to enter the train from the eastern platform, from which most easy and convenient access was had to it. His way, however, seems to have been blocked by the incoming train before he could effect a crossing; and thereupon he deviated obliquely

from the plank walk, going southward upon the western track and seemingly intending to gain access to the train from the western side, the purpose of the oblique movement apparently being to bring him into line with the platform or entrance landing of one of the cars of the train. An express train from the west was moving south at the time on the western track at the rate of about forty or fifty miles an hour. There is conflict of testimony as to whether the whistle of its engine had been sounded at the whistling post north of the station, which has been mentioned. Immediately, however, before Collis was struck, the engineer of the express train sounded the danger signal, consisting of two or three sharp, quick and shrill blasts from the whistle of the engine; but it is controverted whether this was done in time to be of any service. Collis was struck and killed while his foot was still on the easternmost rail of the western track.

The only eyewitness of the transaction was a passenger in the accommodation train, although there were other witnesses introduced on behalf of the plaintiff to show that no whistle had been sounded at the whistling post.

On behalf of the plaintiff evidence was also introduced of the existence of a rule of the railroad company to the effect that, whenever a train was standing at a station engaged in receiving or discharging passengers, no other train should attempt to pass the station until the former had commenced to move, or until its conductor had signalled that other trains might proceed. On behalf of the defendant it was testified that this rule had become obsolete and impracticable; and it was argued that, even if it was in force, it was not applicable to the circumstances of this case, and that it did not appear that the deceased had any knowledge of its existence or had acted upon the faith of it. There was testimony also on behalf of the defendant to controvert the inference of negligence from its alleged failure to sound the whistle in due time; but into the details of this testimony it is unnecessary here to enter.

Upon the case as thus made the defendant moved for an instruction to the jury to return a verdict for the railroad company; and the instruction was given, and a verdict was rendered, upon 23 which judgment was duly entered. To the ruling of the court exception was taken on behalf of the plaintiff; and the case is now here upon his appeal.

The meagreness of the testimony in behalf of the plaintiff in this case must be apparent to every one. It was probably unavoidable; for, as we have stated, there was only one eyewitness of the transaction, and he naturally could have no knowledge and could give no explanation of the circumstances that induced the deceased to place himself in the evidently perilous situation in which he met his death. The station where the accident occurred appears to have been but little frequented, except perhaps at certain hours of the day. It does not appear that there were any persons, other than the deceased, present at the station at the time of the accident; and it does not seem that there are any houses or population in the immediate neighborhood. It is the misfortune, therefore, of the plaintiff's

case that he has no witnesses sufficiently to substantiate it, and that the case itself is almost of necessity based upon inference and conjecture.

There is testimony, it is true, on behalf of the plaintiff sufficient to go to the jury, however weak it may be in fact, upon the question of the defendant's negligence. Whether the engineer of the express train took the ordinary and usual and most reasonable precaution of sounding the whistle of his engine at the place prescribed for him to do so; whether it was due care and caution on his part to run his train into and by this station at the rate of speed at which he did run it; whether the danger signal was given in due time; and whether the engineer should not have stopped his train before entering the station; and whether he could not have stopped it anyhow in time to prevent the disaster which supervened, are all questions upon which the verdict of a jury might perhaps properly have been solicited; although, as we have intimated, the verdict, if in favor of the plaintiff, would undoubtedly be based in a great measure upon conjecture, and conjecture is not a proper basis for judicial determination.

But we do not understand the ruling of the trial court in this case to be founded upon the insufficiency of the proof of the defendant's negligence, but upon the apparent contributory negligence of the deceased himself, and the total failure of the plaintiff's proof to excuse it or to account for it.

That the deceased placed himself in a position of obvious peril is manifest; and that his death was the result immediately of his own voluntary act is too clear for any controversy. If he was justified by the circumstances in so exposing himself to danger, and these circumstances were such as to relieve him from the imputation of contributory negligence, it is incumbent on the plaintiff to adduce proof to that effect. For contributory negligence is necessarily implied from a person's exposure of himself to a position of obvious peril, unless the circumstances, to be shown by him or on his behalf, are such as tend to disprove the inference, whereupon it becomes a question for a jury. Now, we fail to find in the present case any evidence whatever to rebut the presumption of negligence which the law infers from the conduct of the deceased.

It may be assumed that the deceased was entitled to the immunity and protection due from a common carrier to its passengers. But the extent of this immunity and of this protection will differ under different circumstances. It certainly cannot be claimed with reason that the immunity extends so far as to guarantee all the acts of a person who has in his possession a ticket entitling him to transportation. When the common carrier has provided all the appliances that can reasonably be required from it, no further liability on its part can accrue to the benefit of the passenger or proposed passenger until the latter manifests by some overt act that he proposes forthwith to exercise the right of transportation to which he has become entitled. In exercising this right the passenger must also exercise the ordinary care and caution which any reasonable man would exercise under similar circumstances. He is not enti-

tled with impunity to stand upon or cross the tracks of a railroad company, or to enter its trains at an unusual place or in an unusual way, or to leave them in any different place or way, or otherwise to disregard the usual safeguards which every person of reasonable mind and sufficient intelligence recognizes as right and proper to be observed when dealing with the modern instrumentalities of rapid transit, unless there has been some inducement, express or by implication, held out by the common carrier or its agents that one may depart therefrom without danger. A course of conduct pursued or tolerated may amount to such inducement. Usage or custom may constitute an inducement; and so may the special necessities of any situation. Various cases that have been cited in the argument of this case are based upon this theory, such as *The Baltimore and Ohio Railroad Company v. Haner*, 60 Md., 463; *The Phil., Wilm. & Balt. R. R. Co. v. Anderson*, 72 Md., 529; *Terry v. Jewett*, 78 N. Y., 343; *Jewett v. Klein*, 27 N. J. Eq., 550, and *Atchison, Topeka & Santa Fe R. R. Co. v. Shean*, 18 Col., 368. In all these cases it appeared that there was assurance of some kind, direct or indirect, express or implied, by the common carrier to the person injured that the latter might do with safety what he assumed to do. But in the absence of any such assurance, we fail to see, either from reason or from authority, why a common carrier should be held responsible for the departure of a passenger or intending passenger from the ordinary rules of prudence or common sense.

It has been repeatedly said that the very presence of a railroad track is itself notice of danger; and no man of ordinary intelligence has the right to go upon it without taking the ordinary precaution of stopping and looking for approaching trains. A passenger or intending passenger is equally with other persons bound by this rule, except where, by the action of the common carrier, he has been reasonably induced to believe that there is no occasion for its observance. Where he has been induced to alight from a car on the side opposite from the platform, although the presence of another track there and the possibility of the passage of other trains on that track, constitute an element of danger, he is entitled to immunity in consequence of the inducement. So, where he must cross

24 a track in order to take another train to continue his journey, he is entitled to presume that he may do so in safety. And numerous other instances may be cited from adjudged cases in which parties have been held entitled to recover for injuries sustained by them, when it appeared that they risked danger in consequence of representations held out to them that the situation was free from danger. But where there has been no inducement or representation of any kind, and a person has by his own voluntary act, as in the present case, assumed a position of obvious danger, although no doubt the deceased did not fully realize the extent of his danger and his sad mishap was in all probability the result of some sudden impulse that induced him to forget or ignore the danger for the time, yet his action was not any the less contributory negligence in law, and it should not be charged to the account of the defendant. There is total failure of proof on the part of the plaintiff to show

any inducement by the defendant to the deceased that would tend in any manner to justify or excuse the action of the latter. This, as we have intimated, may be his misfortune rather than his fault, but whatever may be the cause of it, the fact exists, and we cannot ignore it.

We regard our conclusion in this case as fully supported by one of the latest utterances of the Supreme Court of the United States upon the subject, the case of *Elliott v. Chicago, Milwaukee and St. Paul R. R. Co.*, 150 U. S., 245, in which the substantial facts were not very unlike those of the present case. There the Supreme Court of the United States, by Mr. Justice Brewer, said:

"We are of opinion that the deceased was guilty of contributory negligence, such as to bar any recovery. It is true that questions of negligence and contributory negligence are ordinarily questions of fact to be passed upon by a jury; yet when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict. *Railroad Co. v. Houston*, 95 U. S., 697; *Schofield v. Chicago, Milwaukee and St. Paul Railroad Co.*, 114 U. S., 615; *Delaware, Lackawanna, &c., Railroad Co. v. Converse*, 139 U. S., 469; *Aerkfetz v. Humphreys*, 145 U. S., 418.

"What then are the facts concerning the accident? It took place at a station called Meckling, a hamlet of two or three houses, and of so little importance that at the time the company had no station agent there. The main track of the defendant's road ran eastward and westward in a straight line, and the ground was level. \* \* \*

"It thus appears that the deceased, an experienced railroad man, on a bright morning, and with nothing to obstruct his view, starts along and across a railroad track, with which he was entirely familiar, with cars approaching and only 25 or 30 feet away, and before he gets across that track is overtaken by those cars and killed. But one explanation of his conduct is possible, and that is that he went upon the track without looking to see whether any train was coming. Such omission has been again and again, both as to travellers on the highway and employees on the road, affirmed to be negligence. The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom. It may be as is urged, that his motive was to assist in getting the hand car out of the way of the section moving on the siding. But whatever his motive, the fact remains that he stepped on the track in front of an approaching train, without looking or taking any precautions for his own safety.

"This is not a case in which one, placed in a position of danger through the negligence of the company, confused by his surroundings, makes perhaps a mistake in choice as to the way of escape, and is caught in an accident. For here the deceased was in no danger. He was standing in a place of safety on the south of the main track. He went into a place of danger from a place of safety, and went in without taking the ordinary precautions imperatively required of

all who place themselves in a similar position of danger. The trial court was right in holding that he was guilty of contributory negligence."

The well-known rules of law here repeated by Mr. Justice Brewer would seem to apply with equal force to the case before us. In this case as in that, there is but one possible explanation of the conduct of the deceased; and that is either that he went upon the track without looking to see whether any train was coming, when, if he had taken that ordinary and necessary precaution, he could not fail to see the express train that was coming down upon the track, or else having looked and seen that train, he took the chances of being able to cross the track before it reached him. It is true that here the deceased intended to board the defendant's train as a passenger, and was neither an ordinary passenger on the highway nor an employé of the road; but we do not understand that a person intending to become a passenger on a train is thereby relieved, any more than other persons, from the observance of the ordinary rules of prudence. It is only when the passenger has placed himself actually or constructively in the charge of the common carrier that he becomes entitled to all the immunities of a passenger; and he may not even then disregard the ordinary safeguards, unless there has been inducement or representation to him that he may do so with safety. We presume that a person could not hold a railroad company to liability if he alighted from a car on the wrong side, on an adjacent track, instead of the platform on the other side, and was thereby injured, unless there was inducement to him from the company to do so; and a person intending to become a passenger can be in no better position than one who desires to leave a train. A common carrier is bound to very great care and caution towards its passengers; but these are not therefore entitled to disregard the ordinary precautions required of prudent men in their situation, so as to charge the common carrier with liability for the injuries sustained by them in consequence of such disregard. It is the absence

of all proof here to show inducement on the part of the railroad company to the deceased to do what he did that compels us to hold him to the inference that must necessarily be drawn from his conduct in the absence of such inducement, or of testimony tending to show its existence.

The case of *The Chicago, Milwaukee & St. Paul Railway Co. v. Lowell*, 151 U. S. 209, which was decided by the Supreme Court of the United States within a short time after the Elliott case, above cited, was that of a passenger who was injured in alighting from a train, by getting off a car on the side next to an adjacent track and being struck by a train moving on that track while he was attempting to cross it. The trial court in that case had left the issue of contributory negligence on the part of the plaintiff, as well as of negligence on the part of the defendant, to the jury, which found for the plaintiff; and the Supreme Court of the United States, in an opinion by Mr. Justice Brown, sustained the ruling. But we do not understand this decision to be antagonistic to that in the Elliott case, or inconsistent therewith. The case of The Railway Company

v. Lowell plainly falls into the category of cases, to which reference has already been made, in which there was inducement or representation by the railroad company that the act, which resulted in injury, could be done with safety. In that case it was shown that there was a rule of the company posted up in the cars which directed passengers to alight on the side more distant from the adjoining track, and thus to avoid danger from trains passing on that track. But the court said:

"Assuming that the plaintiff was bound to read this rule, and was chargeable with knowledge of its contents, there was other testimony tending to show that it was habitually disregarded by passengers with the acquiescence of the conductor and the servants of the road about the station. There was evidence that the plaintiff and his companion Forsberg were met upon the platform of the car by the collector, who asked for their tickets, which were delivered to him; that the collector saw them get off on the south side (next to the adjacent track) and said nothing to them, but immediately upon receiving their tickets entered the smoking car; that no objection was raised to their getting off on the south side, and that other people were in the habit of getting off in the same way. Now, if the custom of passengers to disregard the rule was so common as to charge the servants of the road with notice of it, then it was either their duty to take active measures to enforce the rule, or to so manage their trains at this point as to render it safe to disregard it."

Plainly there was testimony in this case tending to show a usage, sanctioned or acquiesced in by the railroad company, which the plaintiff only followed. In other words, there was inducement to the plaintiff by the railroad company that he might do with safety that which he attempted to do. But that is not the present case.

Under the testimony adduced in the present case, we do not think that it was error in the trial court to direct a verdict for the defendant; and we must sustain that ruling.

*The judgment of the court below must therefore be affirmed, with costs; and it is so ordered.*

26

TUESDAY, October 8th, A. D. 1895.

\* \* \* \* \*

JOHN W. WARNER, Administrator of the  
Estate of Joseph W. Collis, Deceased,  
Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD  
COMPANY.

No. 452. October Term,  
1895.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

October 8, 1895.

MONDAY, October 14th, A. D. 1895.

JOHN W. WARNER, Administrator of the Estate of Joseph W. Collis, Deceased, Appellant,  
*vs.*  
 THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 452.

On motion of Mr. R. Claughton, attorney for the appellant in the above-entitled cause, it is ordered that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving bond in the sum of three hundred dollars.

27 Know all men by these presents that we, John W. Warner, administrator of the estate of Joseph W. Collis, deceased, as principal, and the American Banking and Trust Company of Baltimore City, as surety, are held and firmly bound unto the Baltimore and Ohio Railroad Company in the full and just sum of three hundred dollars (\$300), to be paid to the said Baltimore and Ohio Railroad Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this first day of November, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between John W. Warner, administrator of the estate of Joseph W. Collis, deceased, appellant, and The Baltimore and Ohio Railroad Company, appellee, a judgment was rendered against the said John W. Warner, administrator, and the said John W. Warner, administrator, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Baltimore and Ohio Railroad Company, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said John W. Warner, administrator, shall prosecute said writ to effect and answer all costs if he fail to make his plea good, then the above obligation to be void: else to remain in full force and virtue.

JOHN W. WARNER, [SEAL.]  
*Administrator of the Estate of Joseph W. Collis, Dec'd.*  
 THE AMERICAN BANKING AND  
 TRUST COMPANY OF BALTI-  
 MORE CITY, [SEAL.]  
 By JAS. BOND, *Pres.* [SEAL.]

Sealed and delivered in the presence of—

Witness as to signature of John W. Warner, adm'r:  
 R. CLAUGHTON.

Attest:

[SEAL.] JNO. T. STONE, *Sec'y.*  
 Approved by—

R. H. ALVEY, *Ch. Justice.*

[Endorsed:] No. 452. John W. Warner, adm'r, vs. The Baltimore & Ohio Railroad Co. Bond for costs, writ of error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Nov. 4, 1895. Robert Willett, clerk.

## 28 UNITED STATES OF AMERICA, ss:

To the Baltimore and Ohio Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein John W. Warner, administrator of the estate of Joseph W. Collis, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 4th day of November, in the year of our Lord one thousand eight hundred and ninety-five.

R. H. ALVEY,  
*Chief Justice of the Court of Appeals  
of the District of Columbia.*

Service acknowledged.

G. E. HAMILTON,  
*Att'y for Appellee.*

[Endorsed:] Court of Appeals, District of Columbia. Filed Nov. 5, 1895. Robert Willett, clerk.

## 29 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between John W. Warner, administrator of the estate of Joseph W. Collis, deceased, appellant, and The Baltimore and Ohio Railroad Company, appellee, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record

and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the Seal Court of Appeals, District of Columbia. 4th day of November, in the year of our Lord one thousand eight hundred and ninety-five.

ROBERT WILLETT,  
*Clerk of the Court of Appeals of the District of Columbia.*

30

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and type-written pages, numbered from 1 to 29, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of John W. Warner, administrator of the estate — Joseph W. Collis, deceased, appellant, vs. The Baltimore and Ohio Railroad Company, No. 452, October term, 1895, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Seal Court of Appeals, District of Columbia. Court of Appeals, at the city of Washington, this 8th day of November, A. D. 1895.

ROBERT WILLETT,  
*Clerk of the Court of Appeals of the District of Columbia.*

Endorsed on cover: Case No. 16,092. District of Columbia Court of Appeals. Term No., 377. John W. Warner, administrator of the estate of Joseph W. Collis, deceased, plaintiff in error, vs. The Baltimore & Ohio Railroad Company. Filed November 21st, 1895.



No. 82.

JAMES H. MCKENNEY

Brief of Claughton for P. E.  
Filed Oct. 12, 1897.

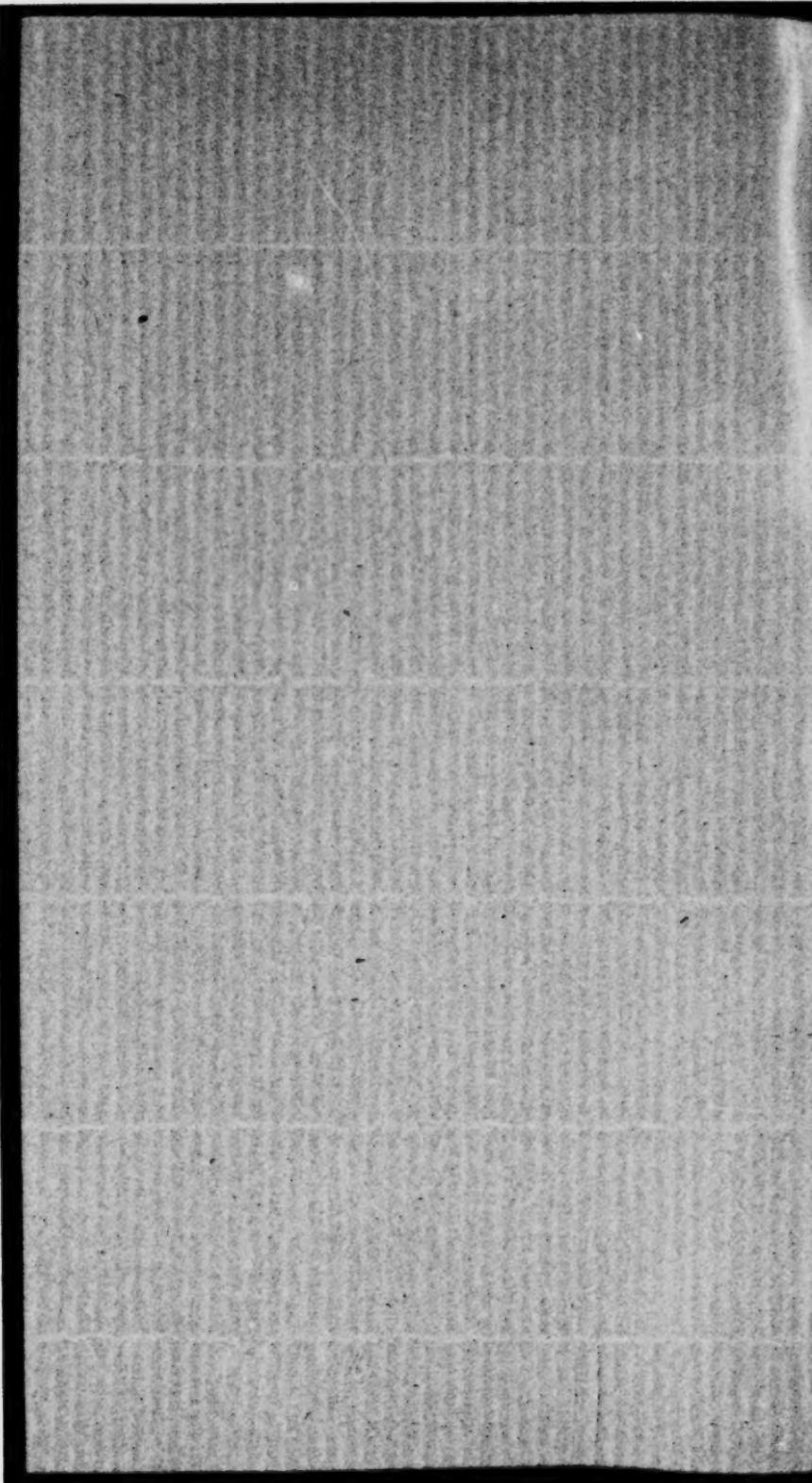
IN THE  
Supreme Court of the United States

OCTOBER TERM, 1897.

JOHN W. WARNER, ADM'R, ETC.,  
*Plaintiff in Error,*  
vs. }  
THE BALTIMORE & OHIO R.R. CO.,  
*Defendant in Error.* }  
No. 82

BRIEF FOR PLAINTIFF IN ERROR.

RODOLPHUS CLAUGHTON,  
Counsel for Plaintiff.



IN THE  
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

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**No. 82.**

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JOHN W. WARNER, ADM'R, ETC., PLAINTIFF IN ERROR,

v/s.

THE BALTIMORE & OHIO RR. CO., DEFENDANT IN  
ERROR.

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**BRIEF FOR PLAINTIFF IN ERROR.**

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**STATEMENT OF THE CASE.**

On the 22d day of June, 1893, plaintiff's intestate having purchased a round trip ticket issued by the defendant, from Forest Glen, Md., to University, D. C., arrived at the latter station about 7.30 a. m., and having attended to business which called him to a locality west of the western tracks at University station, returned to the depot, or ticket office, which is located at said station, and there waited until about 9 a. m., when one of the defendant's local passenger trains, bound to Forest Glen, Md., on which intestate, by virtue of said ticket, was entitled to be carried, came to and stopped at University station, for the purpose of taking on passengers; whereupon, intestate, *having in his possession the return coupon* of said round trip ticket, attempted to cross defendant's western tracks, which he was obliged to cross, in order to

get on defendant's passenger train, then and there standing on defendant's eastern tracks; and, while attempting to cross said western tracks, and while said passenger train was *then and there standing at University station*, defendant's express train, running southward, on the western tracks, at the rate of forty miles an hour—in direct violation of defendant's rule No. 441—which prohibits any train from running past a station where is standing a passenger train—ran past said station, striking and killing intestate, who left him surviving a widow and three children.

It was in evidence, on behalf of plaintiff, that the express which ran down intestate did not ring any bell, or blow any station whistle; and blew only the danger whistle when *about forty feet* from intestate.

It was in evidence on behalf of the defendant, that the express rang the bell, and blew the station whistle; and blew the danger whistle. That there was an unobstructed view of the tracks for the distance of about one mile from the station in the direction whence approached the express which struck intestate.

That the engineer of the express, when he was approaching University station, and when he was about 1,500 or 1,600 feet therefrom, knew the local train was then coming up to said station, which he knew was a usual stopping place for the local train at that hour; that the engineer, when he passed the whistling post, saw intestate on the platform at the depot, and that although the engineer knew of rule No. 441, he did not observe it, because its observance would delay the express train.

That when the engineer on the express observed intestate approaching the local train he endeavored to stop the express; but the high rate of speed at which it was running rendered it impossible to stop before intestate had been struck.

*There was no evidence that intestate knew of his peril, or that he was warned of impending danger in time to avert the same.*

**ASSIGNMENT OF ERROR.**

The Court of Appeals of the District of Columbia erred in affirming the judgment of the trial court in *directing a verdict for the defendant* (Rec., pp. 19, 20, 27).

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**ARGUMENT**

As the contributory negligence which justifies the direction of a verdict depends, among other circumstances, upon the relation existing between the parties, we will consider, first, the relation which existed between plaintiff's intestate and the defendant.

## I.

**Plaintiff's Intestate was a Passenger of Defendant.**

Plaintiff's intestate *had purchased a round trip ticket issued by defendant from Forest Glen to University*, and was about to make the return trip (Rec., pp. 8, 9 and 10). He was at the proper station, at the proper time (Rec., p. 10), and seeking to take passage on a train on which he was entitled to be carried by virtue of the terms of said ticket (Rec., pp. 8 and 10), and said train was then and there standing at said station for the reception of intestate (Rec., p. 8).

"The responsibility of the carrier begins when the passenger presents himself for transportation; and this he may be said to do when he approaches the place of reception, for the purpose."

Cooley on Torts, p. 770.

"Neither the purchase of a ticket *nor the entry into the car* is essential to create the relation of carrier and passenger. The plaintiff asked to buy and pay for a ticket—and, he was entitled to the protection due to a passenger from the moment he entered upon the premises of the defendant."

*Norfolk & Western RR. Co. vs. Galliher*, 89 Va. 643.

"Plaintiff purchased a ticket on defendant's railway; and that fact created the relation of carrier and passenger."

*Wabash, St. Louis & Pac. Ry. Co. vs. Rector*, 104 Ills. 301.

"We do not think that a passenger on a railroad train loses his character as such by alighting from the cars at a regular station, from motives of either *business* or *curiosity*, although he has not yet arrived at the terminus of his journey. It cannot properly be said, we think, if a passenger leaves a train for the purpose of obtaining refreshments, at a regular station, or *transacting business* during its stay there, but *intending to return and continue his passage*, he ceases to be a passenger, or loses the right of being protected by the regulations which the company have provided for the safety of persons *travelling on its cars*, and *using its station grounds*."

*Parsons vs. N. Y. C. & H. R. RR. Co.*, 113 N. Y. 362-3.

*Atchison, T. & S. F. RR. Co. vs. Shean*, 18 Colo. 368.

"Deceased was a passenger with a ticket that entitled him to be carried safely—it was necessary for him to cross over the intervening track of the defendant from one train to another. In making this transit, he continues to be a passenger of the defendant, and entitled to the protection that the highest degree of care on the part of the defendant could afford, under the circumstances."

*Balto. & Ohio R. Co. vs. State, use of Hauer*, 60 Md. 463.

The facts in the case abundantly prove that plaintiff's intestate was a passenger. The court below concede that plaintiff's intestate was a *passenger* (Rec., p. 23).

## II.

**Defendant was Guilty of Gross Negligence.**

*The following facts are proven by defendant's witness, Stephens, and are undisputed:*

That when said witness, who was engineer on the express, was approaching University station, and when distant therefrom about 1,600 feet, he *KNEW the local train was coming up to the station.*

That as he passed the whistling post he saw the *local train coming up to the station*; and *saw intestate on the platform at the depot waiting to take the local train.*

That witness *KNEW said local train was then and there due at said station.*

That witness ran his train past said station at the rate of forty miles an hour.

And that witness *was aware of Rule 441*, but did not observe said rule, *because it would interfere with the schedule time of the express* (Rec., pp. 12 and 13).

The propriety of enforcing such a rule has been declared by the Supreme Court of the United States.

*Chicago, etc., Ry. Co. vs. Lowell*, 151 U. S. 217.

The engineer with full knowledge that defendant, foreseeing the peril to its passengers, had promulgated a rule for the very purpose of preventing that peril—with the further knowledge that the time and occasion for enforcing that rule were present—with the knowledge that intestate was on the platform at the depot waiting to take the train—disregarded the rule, the time, the place, the circumstance, the peril to the passenger, *in order that the express might arrive on schedule time.*

The engineer on the express had been familiar with said rule, for some time—he was also fully aware that the local train was then and there due at said station—he also, when 1,600 feet from the station and approaching thereto at the rate of forty miles an hour, saw intestate at the depot—these

circumstances were sufficient to indicate to defendant's agent not a mere possibility of the passenger's peril, but, a *probability*, if not a *certainty* thereof.

The Court of Appeals of New Jersey say:

"If driving a train of cars at such place, and under such circumstances, does not constitute *gross negligence*, it would seem to be somewhat difficult to imagine what circumstances would render a railroad company liable for negligence *in running down a passenger about to get on board a train at a railroad station.*"

*Klein vs. Jewett, Receiver,* 27 N. J. Eq. 552.

The court below *admit* that there was *sufficient evidence of defendant's negligence to go to the jury* (Rec., p. 23).

But, the learned court held, that, notwithstanding the facts *proven* by the *evidence*, and *conceded* by the *court*—namely:—

That plaintiff's intestate was a *passenger*.

That defendant was *guilty of negligence*.

A verdict for defendant was properly directed, because intestate was guilty of contributory negligence (Rec., pp. 23, 27.)

And the court below say they regard their conclusions as fully supported by the following cases (Rec., p. 25):

*Elliott vs. Chicago, Milwaukee & St. Paul RR. Co.*, 150 U. S. 245.

*Railroad Co. vs. Houston*, 95 U. S. 697.

*Schofield vs. Chicago, Milwaukee & St. Paul RR. Co.*, 114 U. S. 615.

*Delaware & Lackawanna RR. Co. vs. Converse*, 139 U. S. 469.

*Aerkfetz vs. Humphreys*, 145 U. S. 418.

**Not** a case of a **passenger**, but the case of an *employee*.

**Not** a case of a **passenger**, but the case of a *trespasser*.

**Not** a case of a **passenger**, but the case of a *traveler*.

**Not** a case of a **passenger**, but the case of a *traveler*.

**Not** a case of a **passenger**, but the case of an *employee*.

In the case last cited the Supreme Court say:

"We observe that the plaintiff was an *employee*, and, therefore, the measure of duty to him was *not such as to a passenger.*"

*Aerkfetz vs. Humphreys, supra*, 419.

The court below seek to emphasize alleged similarity between the case at bar and the case of *Elliott vs. Chicago, &c., RR. Co.*, 150 U. S., *supra*, by quoting largely from the opinion of the Supreme Court in that case, as follows:

"It (the accident) took place at a station of *so little* importance that the company had *no station agent there.*"

"It appears that deceased, an *experienced railroad man* (*an employee* of the company), starts along and across a railroad track with which he was *ENTIRELY familiar*, with cars approaching, and before he gets across is overtaken by those cars and killed. But one explanation of his conduct is possible; and that is, that he went upon the track *without looking* to see whether any train was coming. Such omission has been again and again, both as to *travelers* on the highway and *employees* on the road, affirmed to be negligence."

*In the case at bar*, the accident occurred at a station at which all trains leaving Washington stop. There was a ticket office and ticket agent at said station (Rec., p. 10). There was a gate watchman at said station (Rec., p. 9).

*In the case at bar*, there was no evidence that intestate was familiar with the road. Intestate was neither a traveler on the highway nor an *employee*. Intestate was a *passenger*, with a ticket, at the proper station, at the proper time. The train on which he was entitled to be carried was standing at the station (Rec., pp. 8 and 10).

It would be useless, if not improper, to consume time in discussing the vast difference in the duty imposed by law

upon the carrier in reference to a **PASSENGER**, as distinguished from the lesser duty owed to employee and traveler.

But, it may be observed, that the learned Court of Appeals, in its research, overlooked a case of an *employee* wherein *the negligence of the defendant was conceded (as in the case at bar)* and, the trial court directed a verdict for the defendant, on the ground of contributory negligence on the part of plaintiff.

This judgment *was reversed* by the Supreme Court of the United States, and that court, in their opinion, say :

“ There is some testimony to show that the plaintiff ran *carelessly* through the depot; that *he knew* the train was approaching, and that *he might have guarded himself against it*, if he had stopped at the exit of the depot long enough *to have looked about him*.

“ But, we think *these are questions for the jury* to determine. We see no reason, *so long as the jury system is the law of the land*, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.”

*Jones vs. East Tenn., &c., RR. Co., 128 U. S. 443.*

We maintain that there is nothing in evidence, in the case at bar, to indicate *any* negligence on the part of plaintiff's intestate; but, were the contrary the case—surely, if a jury must pass upon the rights of one apparently negligent, to whom the carrier owes *small* duty—*a multo fortiori*, must that tribunal decide in cases where are in dispute the rights of those to whom the carrier owes the *utmost degree* of care, skill, and diligence.

The Court of Appeals of the District of Columbia, in affirming the judgment of the trial court in directing a verdict, held that “ the presence of a railroad track is itself notice of danger” (Rec., p. 24). We are glad to say, we do not recall any case, except the case at bar, in which the above doctrine has been invoked against a *passenger* attempt

ing to board a train standing at the station, for his reception.

The learned court below deplore the alleged meagreness of the evidence in behalf of the plaintiff—as well as the fact that one of plaintiff's witnesses, an eye-witness of the occurrence, was unable to *explain the circumstances that induced* intestate to cross the tracks (Rec., p. 22). As already observed plaintiff's witness, Weeks, who was a passenger on the local train, was an eye-witness of intestate's death—but, it is respectfully submitted that the lack of clairvoyant power of this witness in no wise weakens or impairs the cause of plaintiff. The witness White, who was defendant's gatekeeper testified, that intestate *arrived* at the station, at 7.20 A. M.—and this witness again saw intestate at the station, at 8.30 A. M. (Rec., p. 9).

The witness Burke testified that intestate, who was a carpenter, had called on witness, at West Brookland, and witness had promised intestate employment at an early ensuing date (Rec., p. 11).

Thus, we observe intestate arriving at the station; transacting his business with the witness Burke—and then, returning to the station, where, as already noted, the gatekeeper saw him about 8.30 a. m.

The court below refer to the fact that intestate had been seen standing “for some time” on the platform (Rec., p. 21).

The record indicates that intestate waited at the depot about thirty minutes; and, the reason for his so waiting was the fact that the first train on which intestate was entitled to be carried left the station at, or about, 9.09 a. m. (Rec., pp. 10, 13).

### III.

#### **Plaintiff's Intestate was a Passenger of the Defendant, and was not Guilty of Contributory Negligence.**

*It was necessary for intestate to cross defendant's tracks in order to get aboard the train on which his ticket entitled him to be*

*carried* (Rec., p. 10). Said train was standing at the station.

Plaintiff's witness, Weeks, testifies that, when intestate *started to approach* the local train it was at a *stand-still* (Rec., p. 8) This witness further testifies that intestate walked on the board crossing provided by defendant at the station, until he was nearly across the tracks, when he deflected slightly, in order to make a direct line for his car (Rec., p. 9). When intestate had nearly crossed said tracks, defendant's express train ran past said standing train, at the rate of forty to forty-five miles an hour, striking and killing intestate (Rec., pp. 8 and 9). Said express train did not ring any bell (Rec., p. 8), and did not blow the station whistle (Rec., p. 8), and *did not give any intimation of its approach except by blowing the danger whistle* when express was about forty or fifty feet from intestate, and while he was crossing defendant's tracks (Rec., pp. 8 and 9).

Plaintiff's witness Hollige testifies that he was made aware of the approach of the express by its danger whistle, and that he *immediately* looked up, and at that moment, the *rear car* of express train was all he saw, and the rear car was about 200 feet from the station (Rec. p. 11).

The defendant's witness Stephens (engineer on express), testifies that the aggregate length of the express train was about 240 feet (Rec., p. 13).

The testimony of witness Hollige corroborates that of plaintiff's witness Weeks (Rec., p. 8), that the only signal given by the express was the danger whistle;—and, further tends to prove that the engine of express was past the station before the signal was given.

The court below *concede* that, when intestate attempted to board the local train, it “either *had stopped*, or was about to stop at the station” (Rec., p. 21).

Attention is directed to a line of precedents, similar to the case at bar, in which learned courts have, with marked unanimity, declared the law governing this case.

**Intestate, who was a Passenger, was not Obliged to Look and Listen for Approaching Trains.**

The courts of last resort in the States of Massachusetts, Pennsylvania, New York, Maryland, New Jersey and Colorado have held, that a passenger at a railroad depot, when crossing intervening tracks to take passage on a train standing at the depot is not obliged to look for danger from trains approaching on the intervening tracks; and, that under such circumstances, *the question of due care on the part of the passenger must be left to the jury.*

"There was no evidence that the plaintiff looked up the track for the purpose of seeing if a train was approaching; it appeared that he was there for the purpose of taking the cars; that the passenger train which he was about to take stood upon the opposite track discharging and receiving passengers—whether the plaintiff in crossing was in the exercise of due care was a question *within the province of the jury.*"

*Wheelock vs. Boston & Albany RR. Co., 105 Mass. 208.*

The Supreme Court of Pennsylvania, discussing the rule requiring *persons other than passengers* to look and listen before crossing a railroad track, say:

"But this rule is *not applicable to passengers* leaving a train and crossing the track to reach the depot at the point of destination. There are duties which spring from the relations existing between the carrier and its passengers. It is the duty of the company to provide for the safe *receiving* and *discharging* of passengers."

In that case, and in the case at bar, the rule of the railroad company, in reference to the movement of its trains, was substantially the same, and the court say:

"Whether he (intestate) knew of the *existence of the company's rule or not*, he might reasonably assume

under the circumstances that he could safely cross the track *without fear of a train passing while his train was there.*"

*Pennsylvania R. Co. vs. White*, 88 Pa. St. 333, 334.

The Court of Appeals of New York, in a case where a passenger, who, *before the train on which she was to take passage, had stopped at the station*, was injured by another train while she was crossing the tracks to get aboard, say:

"Had the plaintiff looked, she would no doubt have seen the train and avoided the accident. The rule is well settled that a *traveler* crossing a railroad track *on a public highway* is bound to use his eyes and ears to ascertain whether a train is approaching; but this rule has *not been held to apply to passengers who are crossing a track at a station to get on a train.*"

*Terry vs. Jewett, Receiver*, 78 N. Y. 343-4.

"*A passenger, when taking or leaving a railroad car at a station, has the right to assume that the company will not expose him to unnecessary danger;* and, while he must exercise reasonable care, his watchfulness is naturally diminished by his reliance upon the discharge by the company of its duty to passengers to provide them with a safe passage *to* and *from* the train."

*Brassell vs. N. Y. C. & H. R. RR. Co.*, 84 N. Y. 246.

The Court of Appeals of Maryland, in a case very similar to the case at bar, say:

"In crossing over the intervening track from one platform to the other, in order to take the east bound train, the deceased might well assume that the defendant would not expose him to any danger which, by the exercise of due care, could be avoided.

"The general rule that applies in ordinary cases of parties crossing railroad tracks, that they should stop, look and listen, before making the venture, does not apply in a case like the present."

"In such case as this, the rule is, as established by a number of well considered cases, that *the passenger* of the railroad is justified in assuming that the company has, in the exercise of this care, so regulated its trains that the road will be free from interruption or obstruction when passenger trains stop at a depot or station to receive and deliver passengers."

and the court, referring to the passenger, say:

"He was, unless he saw or knew of the approaching train, justified in acting upon the implied assurance that no train would be allowed to pass the station to obstruct the transfer of passengers from one train to another."

*Balto & Ohio RR. Co. vs. State, use of Hauer,* 60 Md. 463-5.

And the same court, in its decision in a more recent case involving similar points, adopt the foregoing opinion, and for the purpose of emphasizing the point already so aptly stated, as the test of the care required of the passenger, *italicise* the words "*Saw or Knew*" occurring in said opinion.

*Phil., Wilm. & Balto. RR. Co. vs. Anderson,* 72 Md. 529, 530.

In a case in which it appeared that a *passenger* who was obliged to cross an intervening track, in going from the depot to the train he was about to take, did not, before approaching the train, look up or down the track to see whether there was danger, but *approached the train diagonally* from the platform of the station, and *before his train had come to a full stop*, the Court of Appeals of New Jersey say:

"He was not bound to take the very shortest route from the platform of the station to that of the nearest, or any other car of the train on which he desired to take passage—nor, was he bound to *look to see whether another train was approaching; or to wait* before crossing the easterly track, *until the passenger train had come to a full stop;* because he was fully warranted,

under the circumstances, in believing that *no train would, at that time, pass over the track which he was obliged to cross, in order to take one of the regular passenger trains of the road*; and, it might not be going too far to say, that *if he had looked and had observed an approaching train, on the easterly track, he would have been fully warranted in proceeding on his way across the track to the passenger train, upon the reasonable supposition that the approaching train would stop before it reached a point opposite the passenger station.*"

*Jewett, Receiver, &c., vs. Klein*, 27 N. J. Eq. 550.

The Supreme Court of Colorado, in a case of a passenger who while crossing the railroad tracks, at a station, on his way to an eating house, was struck by a train, which he could have seen had he looked before crossing (citing 88 Pa. St., 78 N. Y., 84 N. Y., 27 N. J. Eq., 60 Md., and 105 Mass., *supra*) say:

"By the foregoing and other well considered cases, it is settled, that a *passenger* on a railroad while passing from the cars to the depot is not required to exercise that degree of care in crossing a railroad track which is imposed upon other persons; and that he *has the right to assume that the company will discharge its duty in making the way safe*; and *relying upon this assumption, may neglect precautions* that are ordinarily imposed upon a *person not holding that relation.*"

*Atchison, &c., RR. Co. vs. Shean*, 18 Colo. 368.

**There is no Evidence that Intestate had been Warned,  
or that He SAW or KNEW of His Peril.**

*There was no Warning.*

Defendant's witness White was ticket agent at University station, and saw intestate when he arrived at said station, and again at the station, a short time before intestate was killed (Rec., pp. 9 and 10). White was presumably familiar with the movement of defendant's trains, and yet it *does not appear that he or anyone else gave intestate any warning of impending danger.*

**Did Intestate SEE or KNOW of His Peril?**

*There is no evidence that he did.* On the contrary, defendant's witnesses (five in number) testified that intestate crossed the tracks *obliquely, with his side and his back towards the express train*; which evidence tends to show that intestate did not see the approaching train.

Defendant's witnesses who saw intestate cross the tracks are Reynolds, Hughes, Lloyd, Stephens and Mrs. White, and their testimony on that point is as follows: Intestate had his *left side* towards the express (Rec., p. 14)—intestate went over the tracks *obliquely* with his *left side* towards the express (Rec., p. 16)—intestate approached with his *side* and *back* towards the west bound track (Rec., p. 18)—intestate's *side* was towards the express train (Rec., p. 19) and the witness Stephens who was the engineer *on the express* states that intestate walked *obliquely*,—sort of *sideways* with *more of his back to him, than his face* (Rec., p. 13).

It has been held that where a *passenger* at a railroad station, in crossing the tracks to take passage on a train, fails to look for danger, the *fact that such danger would have been apparent to him—had he looked—will not bar his recovery.*

*Terry vs. Jewett, Receiver, etc. (supra) 338.*

*Brassell vs. N. Y. C. & H. R. RR. Co. (supra) 245.*

**Did Intestate Have Timely Warning of His Peril?**

The Supreme Court of the United States, discussing the duty owed by carriers to travelers—a *class, by law, less favored than passengers*—say:

“What is reasonable and timely warning may depend on many circumstances. It cannot be such, if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of the coming shot; but the velocity of the latter generally outstrips the warning.”

*Continental Improvement Co. vs. Stead, 95 U. S. 164.*

under the circumstances, in believing that *no train would, at that time, pass over the track which he was obliged to cross, in order to take one of the regular passenger trains of the road*; and, it might not be going too far to say, that *if he had looked and had observed an approaching train, on the easterly track, he would have been fully warranted in proceeding on his way across the track to the passenger train, upon the reasonable supposition that the approaching train would stop before it reached a point opposite the passenger station.*"

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*Continental Improvement Co. vs. Stead, 95 U. S. 164.*

The alleged *blowing of the station whistle* by the express is DENIED by plaintiff's witnesses.

Plaintiff's witnesses prove that the *only intimation of the approach of the express* was the *blowing of the danger signal* when the express was about *forty or forty-five feet* from intestate.

*Two of defendant's witnesses*, Perry and Lloyd, respectively engineer and brakeman on the local passenger train, testify (corroborating plaintiff's witnesses in that respect) that the *only whistle they heard blown by the express* was the *danger whistle* (Rec., pp. 13, 18).

That being a fact—the express passed the station in *less than one second after the only warning of its approach*, and a period almost too brief for estimate was the only opportunity of escape from death afforded by defendant to one to whom, under the circumstances, defendant owed the duty of protection from any injury that could be avoided by human care and foresight.

The Court of Appeals of New York have declared that the approach of a train (at the rate of forty miles an hour) is—

“*Stealthy and imperceptible*, and the sound is not readily distinguishable from others associated with no danger.”

*Ernst vs. Hudson River RR. Co., 35 N. Y. 35.*

We have seen that six courts of last resort have held that a *passenger at a depot*, when crossing the railroad tracks to take a train standing at the station, is not required to look for danger from a train on the tracks which he is crossing; and his failure to look for such danger is not negligence, even though he could have seen, and averted the danger, had he looked; and, unless he saw or knew of impending peril, he is not negligent in crossing (105 Mass., 88 Pa. St., 78 N. Y., 84 N. Y., 60 Md., 72 Md., 27 N. J. Eq., 18 Colo., *supra*).

We have also seen, by the testimony of five of defendant's

witnesses, that intestate crossed the tracks at an angle which would have prevented his seeing the approaching express.

The Supreme Court of the United States have passed upon a case wherein the following facts similar to those in the case at bar appear.

*Chicago, &c. Ry. Co. vs. Lowell*, 151 U. S. 217.

*That was a case of a passenger.*

There was an *unobstructed view* of the tracks.

There was a rule prohibiting the running of trains past a station at which a train was standing.

There were two platforms at the station.

There was both *negative* and *positive* testimony in the case.

Thus far, there is similarity between that case and the case at bar.

The only dissimilarity is, inferentially, *in favor* of plaintiff's intestate; and is thus:

In that case, the plaintiff was *familiar* with the movement of defendant's trains. In the case at bar, there is *no evidence* tending to prove that plaintiff's intestate was aware of the time at which *the express was due at the station*.

In that case, defendant had placed a *sign* at the station, *warning its patrons of danger*.

In the case at bar, there was no evidence to prove that intestate, by sign, signal, or notice of any kind, was given warning of the danger to which he was subjected.

In disposing of the case last cited, the court say:

"Proof that the plaintiff violated the regulations of the company, even without the excuse of a cogent necessity, will *not as matter of law*, debar him from a recovery."

*Chicago, &c. Ry. Co. vs. Lowell, supra.*

## IV.

We fully appreciate the force and wisdom of the rule that directs a verdict, when a verdict contrary to that directed should be set aside.

But this honorable court has not left it a question, when a verdict may be directed.

This eminent authority has held that:

"In many cases, where the facts are *undisputed*, the effect of them is for the judgment of the court, and not for the decision of the jury. In some cases, too, the *necessary inference* from the proof is *so certain* that it may be ruled as a question of law."

And the court, in illustration, say:

"If a *sane man voluntarily throws himself in contact with a passing engine*, there being *nothing to counteract the effect of this action*, it may be ruled, as a matter of law, that the injury to him resulted from his own fault, and that no action can be sustained by him, or his representatives."

The court, after a similar illustration, say:

"But, these are *extreme* cases. It is in relation to *intermediate* cases that the opposite rule prevails. Upon the facts proven in *such cases*, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. It is assumed that twelve men know more of the common affairs of life than does one man—that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

The court (citing, with approval, *Detroit & W. RR. Co. vs. Van Steinberg*, 17 Mich. 99) continuing, say:

"The cases are largely examined, and the rule laid down that when the facts are *disputed*, or when they are *not disputed*, but different minds might honestly draw different conclusions from them, *the case must be left to the jury* for their determination."

*Railroad Co. vs. Stout*, 17 Wall. 663–664.

To the same effect are the decisions in *Richmond & Danville RR. Co. vs. Powers*, 149 U. S. 43; *Gardner vs. Michigan Cen. RR.*, 150 U. S. 349.

One of the latest utterances of the Supreme Court upon the subject is thus:

"It is only where the facts are such that *all reasonable men* must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court."

*Texas & Pacific Ry. Co. vs. Gentry*, 163 U. S. 353.

The evidence establishes that plaintiff's intestate *was a passenger*.

That intestate was not aware of his peril.

The law declares that intestate *was not required to look for danger*.

The law declares that although danger might have been apparent to intestate, had he looked; yet, *in failing to look, he was not guilty of contributory negligence*.

Is the case at bar the *extreme* case instanced by this honorable court, or, is it a case where *different* minds might *honestly* draw *different* conclusions?

Is it probable that twelve reasonable men would have been impelled by the facts in this case, to the unanimous conclusion that intestate on his way to take a train then and there waiting for him at the station, "voluntarily threw himself in contact with a passing engine?"

In what respect was intestate negligent?

Intestate was a passenger, holding a ticket issued by defendant. He was at the station where he had a right to be. He was there at the proper time to take his train. The train on which his ticket entitled him to be carried was standing at the station for the very purpose of receiving passengers.

Intestate, with the right to board the train—with the presence of the train indicating that the time to enforce that right had arrived—proceeds to exercise his rights as a passenger, and, in so doing, is slaughtered by the defendant whose first duty was to protect intestate from all peril against which human foresight could provide.

The court below, in affirming the judgment *directing the verdict*, held that all reasonable men must unanimously conclude, that intestate, while crossing defendant's tracks, in attempt to take a train standing at the station for his reception, was, in so doing, guilty of negligence in not apprehending danger which, in theory of law, could not then and there exist—and of which, as the facts in the case clearly indicate, intestate neither knew, nor was warned.

It is respectfully submitted that the error is palpable, and the judgment should be reversed.

RODOLPHE CLAUGHTON,  
*Counsel for Plaintiff.*

No. 82.

Brief of Hamilton & Colbert

HAMILTON & COLBERT

Oppellee

Filed Oct. 19, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 82.

JOHN W. WARNER, ADMINISTRATOR, APPELLANT,

vs.

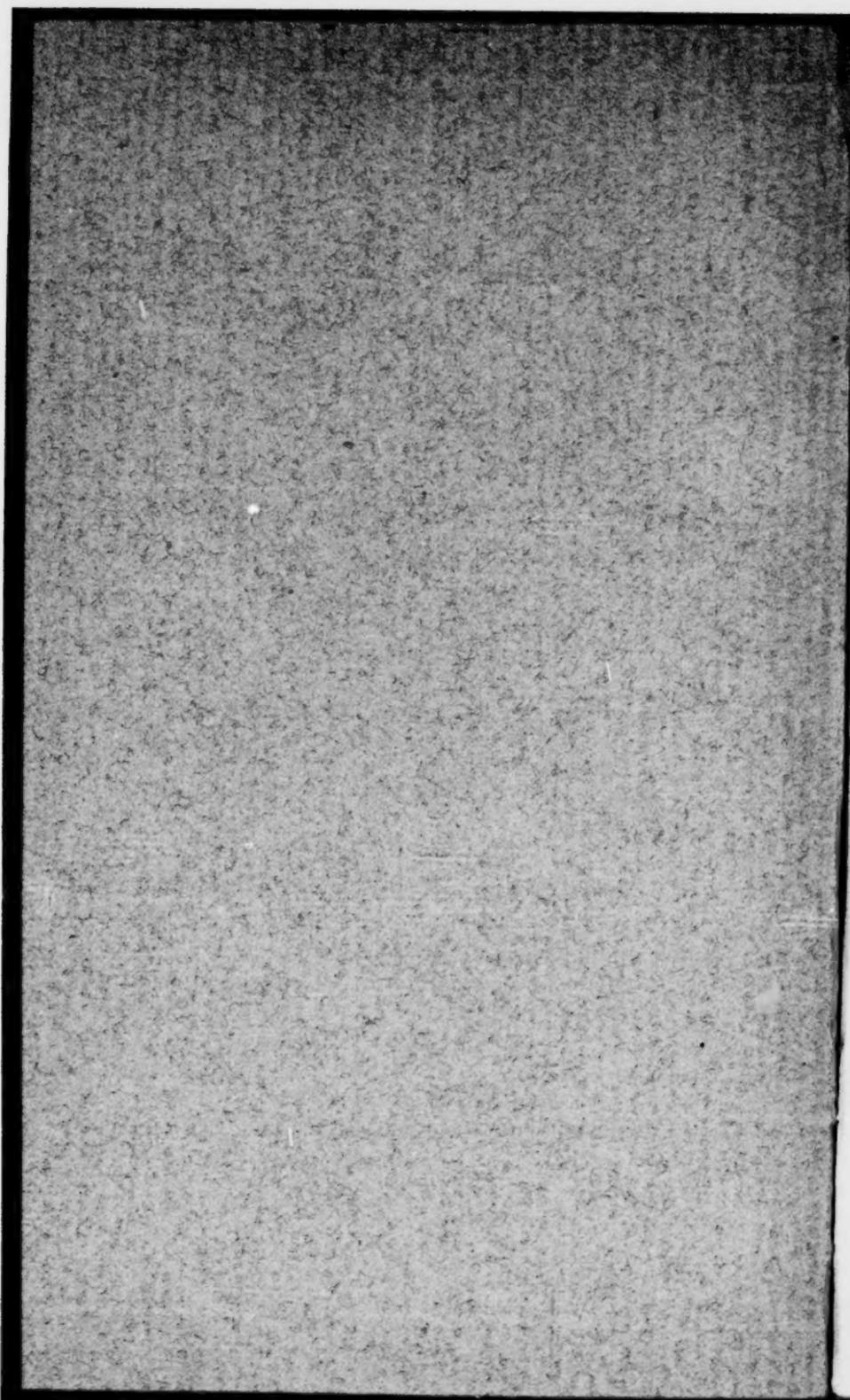
THE BALTIMORE AND OHIO RAILROAD COMPANY.

**BRIEF ON BEHALF OF APPELLEE.**

G. E. HAMILTON,

M. J. COLBERT,

*For Appellee.*



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I.

STATEMENT OF CASE.

On June 22, 1893, the plaintiff's intestate, Joseph W. Collis, was at University station, in the county of Washington, where he had been seated for half an hour or more before the time of the accident. Shortly after 9 o'clock a local train of the defendant company was approaching Brookland from the east, and the decedent, Collis, got up from his seat and started towards the local train, which at that moment had almost come to a stop. When Collis put his foot on the west rail of the west track and started to cross over an express train coming towards the east was only forty or fifty feet away. For some

unaccountable reason Collis did not see or hear, nor did he stop to see or hear, the approaching train, which was running forty or forty-five miles an hour. Before he had time to take more than a few steps, and before he had time to clear the west track, the express train was upon him, and his death resulted almost instantly. At University, the station or depot was built on the west side of the tracks, and a platform had been erected extending from the depot to the west track, and a similar, though smaller, platform had been erected on the other side. The west platform was used by passengers alighting from or taking passage on east-bound trains, and the east platform was used by passengers on west-bound trains. At or near the point where Collis was killed a small board crossing connected the two platforms, and a person standing at the point where Collis left the west platform to cross over the tracks had a clear and unobstructed view along the tracks toward the west of more than a mile. It was claimed on behalf of the plaintiff that the engineer of the express train was negligent in not blowing his whistle or giving some timely notice of the approach of his train, and was also negligent in failing to observe the provisions of rule 441 of the company, which provided that when a passenger train is standing at a station no other train shall pass it. The court below held that the plaintiff's intestate was guilty of such negligence contributing to his injury as prevented a recovery, and directed a verdict and judgment for the defendant.

## II.

*There is no evidence of any negligence on the part of the defendant.*

It is not claimed that any employé of the defendant other than the engineer of the express train was negligent, and the claim is that he failed to blow the usual and customary

whistle for University station, and that he was negligent in failing to stop his train before arriving at University station, while the local train was standing there, as required by rule 441.

It will be observed that there are but two witnesses produced by the plaintiff who testify to the main fact—Holledge, who testifies that the first intimation he had of the approach of the express train was a long, shrill blast, which was sounded when the express train was only 50 feet from the station; that he heard no other whistle, and that he did not see the accident; and Weeks, who testified that he was a passenger on the local train and that he did not hear or see the express train until it was within 40 feet of the deceased; that his attention was attracted by the blowing of the danger signal, which was a succession of *short, sharp* blasts, and not the long, screeching sound testified to by Holledge. The testimony of these two witnesses, coupled with the fact that the express train failed to stop before reaching University station while the local train was standing at that point, is the only evidence upon which a claim of negligence on the part of the defendant is pretended to be based.

1. It will not be seriously contended that the testimony of Holledge would warrant a verdict for the plaintiff. He was standing two squares from the station. He did not hear any danger signal, but simply heard the long blast or station whistle, and did not see the accident. He does not pretend to say that only one whistle was blown, and his testimony is purely negative. Weeks testifies that the only whistle he heard was the danger signal or succession of short blasts, and that he heard no other whistle. As against this we have the positive, certain, and unequivocal evidence of Stephens (p. 12), Reynolds (p. 14), Lee (p. 14), Hampton (p. 15), Thompson (p. 16), Hine (p. 16), Hughes (p. 16), Queen

(p. 16), Lewis (p. 17), White, who was one of the plaintiff's own witnesses (p. 17), Lloyd (p. 18), and Mrs. White (p. 18).

It has been decided many times by the Supreme Court of the United States that where the evidence is such that reasonable men might draw different conclusions from it it is necessary that the fact in dispute should be submitted to the jury.

*McKey vs. Hyde Park Village*, 134 U. S., 84.

*R. R. vs. Powers*, 149 U. S., 43.

But it is also as well established that where the evidence is such that if a verdict rendered upon it would necessarily be set aside as against the evidence or against the clear weight of the evidence it is the duty of the court, in advance, when asked to do so, to direct a verdict for the defendant.

*Ins. Co. vs. Doster*, 106 U. S., p. 30.

*Kane vs. Ins. Co.*, 128 U. S., 91.

In this case we have the testimony of twelve persons testifying positively to a fact as against the negative testimony of two persons who contradict each other. It is respectfully and confidently submitted that under such a state of evidence no finding by any jury that the station whistle was not blown could be for a moment sustained. It is undoubtedly true that Holledge and Weeks were conscientious in their statements that they heard only one whistle, and it is very natural that they should not hear any other. Holledge was in an open field, engaged in cleaning his horse; Weeks was inside a car of the local train, not expecting the approach of the express train and giving no heed to its movements. We submit that the court below was right in holding that it had been established beyond question by the whole evidence that there was no negligence on the part of the defendant with respect to the express train giving timely notice of its approach to the station.

2. Was the engineer of the express train negligent in failing to stop his train and waiting until the local train had pulled out from University? In the first place, we submit that the evidence shows that when the express train passed University the local train had not come to a stop, and, in fact, moved some distance beyond the meeting point of the two trains, as testified to by Thompson (p. 15); but we concede that some of the witnesses do testify that before the express train reached University the local train had come to a full stop. The engineer of the express train testifies that he was not certain whether the local train had stopped or not; but, however that may be, we contend that there was no negligence on the part of the engineer in this respect. The fact that he violated rule 441, if he did, in fact, violate it, is no evidence of negligence. The plaintiff's intestate had no knowledge of the rule and placed no reliance upon its observance and was not misled by its breach. That regulation was a private regulation between the company and its employés governing their relations to each other, and a breach of such a rule of itself is no evidence of negligence unless the court is prepared to hold that, rule or no rule, a railroad company, as a matter of proper caution and prudence under such circumstances, should not allow any express train to pass any other train standing at any county station. But it is in evidence, and it is uncontradicted, that although this rule was in the rule book of the company, it was never observed, because it was impossible of observance and was practically a dead letter (p. 13). We assume that the court will take notice of the geography of this District. University is a station at a small—very small—country town. Between the city limits at Boundary street and the District line on the Metropolitan branch of the defendant's road there are eight such stations, separated from each other by perhaps half a mile. Assuming that express trains will run half a mile in 45 seconds, which is at the rate of 40 miles an hour, it will take an express

train just 45 seconds to pass between two such stations as Terra Cotta and University, and assuming that a local train will consume even as little as half a minute in receiving and discharging passengers and freight at each local station, it will be seen that it is physically impossible for trains to avoid passing each other at some one or more stations on the road, and to hold that a railroad company in the exercise of that care which it owes to its passengers must observe some such provision as that contained in rule 441 would render rapid transit impossible, and, as Stephens testified (p. 13), would render it impossible for express trains to make schedule time.

### III.

*The plaintiff's intestate was guilty of such negligence contributing to his injury as prevents a recovery.*

The evidence in this case shows that the deceased in broad daylight, at a point where he had a clear and unobstructed view of the tracks for more than a mile, at a time when he was not, in the hurry of the moment, apt to omit the precautions which an ordinarily prudent man would take, at a small country station, where he knew trains were constantly passing and repassing, undertook to cross the railroad tracks in front of an express train at a moment of time when the engine of that train was only forty feet away from him, and undertook to cross over without looking or listening to see if he could make the crossing in safety.

If Mr. Collis were an ordinary traveler attempting to cross the tracks of a railroad company even at a highway or street crossing it would be too plain to admit of argument that his conduct would have been so grossly negligent that no recovery could be had for his death.

R. R. Co. vs. Houston, 95 U. S., 697.

Schofield vs. R. R. Co., 114 U. S., 615.

4 Am. and Eng. Enc. of Law, p. 70, and cases there collected.

But in this case it is contended that the decedent was a passenger entitled to all the rights of a passenger, and that by virtue of his relation to the railroad company he was exempted from the exercise of that diligence which the law requires of ordinary travelers on the streets and highways at their intersection with railroad tracks.

At the time of the accident Mr. Collis had in his pocket a ticket entitling him to ride from University to Forest Glen, and when killed he was heading towards the local train with the apparent intention of taking passage upon it. We are prepared to concede that this was sufficient evidence to warrant a finding that he was in fact a passenger, and that it was perhaps the best evidence that the nature of the case admitted of, and we are prepared to admit that under some circumstances a passenger about to board a train is entitled to rely upon the belief that the railroad company has provided reasonably safe means of entrance to and exit from its trains. Thus in the case of *R. R. Co. vs. The State* the court of appeals of Maryland held that where a passenger, in order to reach his destination, had to change cars and cross over intervening tracks, he was entitled to rely upon the faithful observance by the railroad company of such regulations as would secure a safe transfer from one train to another.

*R. R. Co. vs. State*, 60 Md., 468.

And in the case of *R. R. Co. vs. Anderson* the same ruling was affirmed.

*R. R. Co. vs. Anderson*, 72 Md., 530.

But in the former case the court was careful to add that even where a passenger was crossing from one train to another connecting train the passenger himself must exercise reasonable care, and in the latter case the court laid stress upon the fact that the passenger had knowledge of a rule of the company which provided that when a train was

discharging passengers at a station an approaching train on a parallel track must be stopped and not allowed to reach it.

In Massachusetts it was held that no recovery could be had for the death of a person caused by being struck by a railroad train while running along the track in front of it for the purpose of getting on a train approaching in the opposite direction on a parallel track.

*Tuttle vs. Ins. Co.*, 134 Mass., 175.

And it was held by the same court that where a woman holding a ticket and intending to take a train approached a station of the company at a place used by the public for crossing the tracks, but was forced to wait until a freight train had passed, and after it had passed she started to cross the tracks to take passage on a train and was struck by a train following the one which she had waited to pass, she was not entitled to recover.

*Wheelwright vs. R. R. Co.*, 135 Mass., 225.

In the case of *Wheelock against the Railroad Company*, 105 Mass., 208, cited in appellant's brief, the very meager opinion emphasizes the fact that there was some evidence that the injured passenger used his senses of sight and hearing before crossing.

In the case of *R. R. Co. vs. Powers*, 149 U. S., 43, Mr. Justice Brown made use of this language: "The question of contributory negligence could not be determined by the court unless it was affirmatively shown that the deceased when he left the car knew that he was walking along a track and that there was danger from another train, and with such knowledge *neither looked* nor took precautions to satisfy himself whether there was present danger therefrom, it cannot be held that as matter of law there was contributory negligence."

In the present case all these elements were present. It was broad daylight. The decedent lived along the line of the railroad and was familiar with the movement of its trains.

The proper signals of the approaching train were sounded. In the face of a danger that *must* have been apparent to a reasonably careful man, the decedent undertook to approach what the court of appeals of Maryland said was in itself a "warning and a place of danger," and met his death.

#### IV.

This case in all of its bearings was carefully considered by the court of appeals, and from the opinion of that court (Rec., pp. 21-27) it will appear, first, that upon the question of negligence of the appellee (company) the testimony before the trial court was so meager and conjectural as to bar any recovery by the plaintiff on the ground of negligence or liability in the defendant (Rec., p. 23), and, second, that the deceased placed himself in a position of obvious peril, and his death was the result immediately of his own voluntary act.

In discussing the question of contributory negligence the court of appeals says: "We regard our conclusion in this case as fully supported by one of the latest utterances of the Supreme Court of the United States upon this subject, the case of *Elliott vs. Chicago, Milwaukee and St. Paul R. R. Co.*, 150 U. S., 245, in which the substantial facts were not very unlike those in the present case." The court of appeals (Rec., pp. 25 and 26) quote exhaustively from the opinion of Mr. Justice Brewer in that case, and, applying it to the case at bar, conclude with "the well-known rules of law here repeated by Mr. Justice Brewer would seem to apply with equal force to the case before us."

The contention made by the plaintiff that the ordinary rules as to negligence and contributory negligence did not apply to the case at bar, because of the fact that the deceased was the holder of a ticket and therefore entitled to the immunity and protection due from a common carrier to its passenger, is also very fully considered by the Court of Appeals, and the authorities relating to this question carefully

examined and discussed. The court, well recognizing the duty of common carriers to passengers, held that the extent of the immunity and protection imposed by this duty will differ under different circumstances. In its opinion (Rec., p. 23) the court says:

"It certainly cannot be claimed with reason that the immunity extends so far as to guarantee all the acts of a person who has in his possession a ticket entitling him to transportation. When the common carrier has provided all the appliances that can reasonably be required from it, no further liability on its part can accrue to the benefit of the passenger or proposed passenger until the latter manifests by some overt act that he proposes forthwith to exercise the right of transportation to which he has become entitled. In exercising this right the passenger must also exercise the ordinary care and caution which any reasonable man would exercise under similar circumstances. He is not entitled with impunity to stand upon or cross the tracks of a railroad company or to enter its trains at an unusual place or in an unusual way or to leave them in any different place or way, or otherwise to disregard the usual safeguards which every person of reasonable mind and sufficient intelligence recognizes as right and proper to be observed when dealing with the modern instrumentalities of rapid transit, unless there has been some inducement, express or by implication, held out by the common carrier or its agents that one may depart therefrom without danger. A course of conduct pursued or tolerated may amount to such inducement. Usage or custom may constitute an inducement, and so may the special necessities of any situation. Various cases that have been cited in the argument of this case are based upon this theory, such as *The Baltimore and Ohio Railroad Company vs. Haner*, 60 Md., 463; *The Phil., Wilm. & Balt. R. R. Co. vs. Anderson*, 72 Md., 529; *Terry vs. Jewett*, 78 N. Y., 343; *Jewett vs. Klein*, 27 N. J. Eq., 550, and *Atchison, Topeka & Santa Fe R. R. Co. vs. Shean*, 18 Col., 368. In all these cases it appeared that there was assurance of some kind, direct or indirect, expressed or implied, by the common carrier to the person injured that the latter might do with safety what he assumed to do; but, in the absence of any such assurance, we fail to see, either from reason or from authority, why a common carrier should be held responsible for the departure

of a passenger or intending passenger from the ordinary rules of prudence or common sense.

"It has been repeatedly said that the very presence of a railroad track is itself notice of danger, and no man of ordinary intelligence has the right to go upon it without taking the ordinary precaution of stopping and looking for approaching trains. A passenger or intending passenger is equally with other persons bound by this rule except where, by the action of the common carrier, he has been reasonably induced to believe that there is no occasion for its observance. Where he has been induced to alight from a car on the side opposite from the platform, although the presence of another track there and the possibility of the passage of other trains on that track constitute an element of danger, he is entitled to immunity in consequence of the inducement. So, where he must cross a track in order to take another train to continue his journey, he is entitled to presume that he may do so in safety. And numerous other instances may be cited from adjudged cases in which parties have been held entitled to recover for injuries sustained by them when it appeared that they risked danger in consequence of representations held out to them that the situation was free from danger. But where there has been no inducement or representation of any kind, and a person has by his own voluntary act, as in the present case, assumed a position of obvious danger, although no doubt the deceased did not fully realize the extent of his danger and his sad mishap was in all probability the result of some sudden impulse that induced him to forget or ignore the danger for the time, yet his action was not any the less contributory negligence in law, and it should not be charged to the account of the defendant. There is total failure of proof on the part of the plaintiff to show any inducement by the defendant to the deceased that would tend in any manner to justify or excuse the action of the latter. This, as we have intimated, may be his misfortune rather than his fault, but whatever may be the cause of it the fact exists and we cannot ignore it."

It is respectfully submitted that the judgment below should be affirmed.

G. E. HAMILTON,  
M. J. COLBERT,  
*For Appellee.*

**Statement of the Case.**

but that apart from any question which might have arisen from the proof ~~as~~ ~~an~~ entirely, and apart from the conflicting evidence as to the failure to give warning or proper signals, in the light of the ruling in *Chicago, Milwaukee &c. Railway v. Lowell*, 151 U. S. 209, it is obvious there was no room reasonably to claim that it should have been determined, as matter of law, that the railroad company had not been negligent.

The rule of the defendant company that "when one passenger train is standing at a station receiving or discharging passengers on double track no other train, either passenger or freight, will attempt to run past until the passenger train at the station has moved on or signal is given by the conductor of the standing train for them to come ahead, and the whistle must not be sounded while passing a passenger train on double track or sidings unless it is absolutely necessary," is a proper one, and applies to this case.

The duty owing by a railroad company to a passenger, actually or constructively in its care, is of such a character that the rules of law regulating the conduct of a traveller upon the highway when about to cross and the trespasser who ventures upon the tracks of a railroad company are not a proper criterion by which to determine whether or not a passenger who sustains injury in going upon the tracks of the railroad was guilty of contributory negligence.

A railroad company owes to one standing towards it in the relation of a passenger a different and higher degree of care from that which is due to mere trespassers or strangers, and it is conversely equally true that the passenger, under given conditions, has a right to rely upon the exercise by the road of care; and the question of whether or not he is negligent, under all circumstances, must be determined on due consideration of the obligations of both the company and the passenger.

When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determining the matter is for the jury.

THIS action was begun in the Supreme Court of the District of Columbia to recover damages for the killing of the plaintiff's intestate on June 22, 1893, at a suburban station of the city of Washington, located on the line of the defendant's road, known as University station.

It appeared from the evidence that at the station referred to the company operated a double track road, the tracks running substantially from north to south, the southerly direction leading to Washington and the northerly direction leading away from that city. The two tracks being side by side, one consequently lay to the west and the other to the east. The distance between the rails of each track was four feet eight

## Statement of the Case.

and a half inches, while the distance between the east and west tracks, respectively, was seven feet five inches.

At the place in question the station building was on the outer side of the west track, and contained a waiting room, a ticket office and the other conveniences of a passenger station. Fronting the station building and beside the track was the necessary platform to enable passengers to enter or descend from any train which might there stop. In the space between the east and west track there was no platform or other facility for passengers either to enter or leave the train, but on the other side of the east track there was a platform which was uncovered, but which was manifestly constructed for the purpose of facilitating the entry into or departure from any train which might stop at that point on the east track. These east and west platforms were connected by a plank crossing, which came opposite the centre of the station building.

There was a road crossing adjoining the station, and the travel was such as seems to have necessitated the use of crossing gates and the employment by the railroad company of a gate watchman. On the east side of the track there was also a settlement known as Brookland, and several of the witnesses who testified at the trial lived in the immediate vicinity of the station in question.

Whilst, as we have said, the substantial direction of the two tracks was north and south, nevertheless the proof showed that in the southward direction of the tracks, that is, towards Washington, the tracks were not perfectly straight, but were somewhat curved. As to the foregoing facts, there seems from the bill of exceptions to have been no conflict of proof.

There was proof tending to show that on the morning of the accident, at about twenty minutes past seven o'clock, the deceased alighted at University station from a local train bound to Washington. One of the stopping points of such train on the way to University station was a small station known as Forest Glen. After attending to some business in the neighborhood of University station, Collis returned to that station at about half-past eight o'clock on the same morning. He was then seen engaged in conversation with several persons

## Statement of the Case.

in or about the station building, which we have already described. There was a local train bound out from Washington, that is, going north, which was scheduled to stop at Forest Glen, and which was due to arrive at University station at *nine* minutes past nine o'clock, whilst there was an express train bound to Washington scheduled to pass the same station at *eleven* minutes past nine. The proof tended to show that the local train arrived at University station a few minutes late, and that either as it was stopping at the east platform or after it had actually stopped there Collis, who had in his possession a return-trip ticket from University station to Forest Glen, hurriedly went from under the arch of the station building in the direction of the local train. There was conflict in the proof as to whether, when Collis started, the local train had actually stopped on the east track or was slowing down. There was also conflict in the evidence as to where Collis was when he started to the local train. The engineer of the express train testified "that after he got by the whistling post he saw Mr. Collis standing on the platform, but did not think that Collis would go over," and that it was not until Collis started across that he gave the danger signals; whereas another witness for the defence testified that Collis was sitting behind the arch of the station building when the local train arrived, and as it did so he went around the station building "to cross the track and get on his train," and "started straight across, did not stop at all and did not look in either direction." There was conflict also in the proof as to whether, in crossing towards the train, Collis went on the crosswalk connecting the two platforms, or diagonally upon the track away from the board walk and bearing towards the local train. Some of the witnesses testified that as he started toward the local train, not being opposite a platform by which to enter a coach, he obliquely directed his course towards the south as though to reach the platform and steps of a car on the local train, whilst other testimony tended to show that as he came out from under the arch and around the building he pursued a course directly across the track towards the local train.

## Statement of the Case.

The testimony moreover established that whilst Collis was making the movement towards the local train, in one or the other of the modes above described, the express came down the west track, past the station, running by the standing or stopping local train at the rate of between forty and forty-five miles an hour, and that by the train so moving Collis was struck and killed. The proof further tended to show that there was a clear view of the track going north from the station for a considerable distance, and that there was a whistling post for the station located fifteen or sixteen hundred feet beyond the station. There was no proof, however, showing that a view of the rapidly moving express train was possible from under the archway of the station from which some of the proof tended to show Collis came on his way towards the local train.

There was conflict in the testimony as to whether the express train whistled at the whistling post. Some of the witnesses testified that the only signal given as the train approached the station was the danger signal which was sounded when the engine was only fifty or sixty feet from the point where Collis was killed; while others testified that a long blast for the station was sounded at the whistling post. There was no proof tending to show that any notice or warning, by sign or otherwise, was given, of the danger which might be incurred if a passenger attempted to cross the west track in order to board a train on the east track, nor was there any proof offered tending to show that any warning or notice was given, either by the ticket agent, gate watchman or the employés of the local train, to passengers actually in waiting at the station, of the fact that the express train was due under its schedule, and, if on time, would pass the station without stopping, and almost simultaneously with the arrival of the local train.

It was proven that a book of rules issued by the company to its employés contained the following:

"No. 441. When one passenger train is standing at a station receiving or discharging passengers on double track no other train, either passenger or freight, will attempt to

## Opinion of the Court.

run past until the passenger train at the station has moved on or signal is given by the conductor of the standing train for them to come ahead, and the whistle must not be sounded while passing a passenger train on double track or sidings unless it is absolutely necessary."

While the engineer of the express train testified that coming down towards University station he saw the local train and did not know whether it was moving or had stopped entirely, or was going to stop or not, he also admitted that he knew of the existence of Rule 441, but that "it was impossible to carry out the rule and make schedule time, and that the rule never was carried out."

At the close of the evidence for both parties the defendant requested a peremptory instruction in his favor, which the court gave, and by reason thereof the jury returned a verdict in favor of the defendant. From the judgment thereupon entered an appeal was taken to the Court of Appeals of the District of Columbia, where the judgment was affirmed. The case was then brought into this court by writ of error.

*Mr. Rodolphe Claughton* for plaintiff in error.

*Mr. G. E. Hamilton* for defendant in error. *Mr. M. J. Colbert* was on his brief.

MR. JUSTICE WHITE, after stating the case, delivered the opinion of the court.

The peremptory instruction by the trial court and the affirmance of its action by the appellate court manifestly proceeded not on the theory that, as a matter of law, there was no negligence on the part of the defendant, but that the proof of contributory negligence on the part of the plaintiff was so conclusive as to leave no question for the consideration of the jury. Indeed, apart from any question which may have arisen from the proof as an entirety, and apart from the conflicting evidence as to the failure to give warning or proper signals, in the light of the ruling in *Chicago, Mil-*

## Opinion of the Court.

*waukee &c. Railway v. Lowell*, 151 U. S. 209, it is obvious there was no room reasonably to claim that it should have been determined, as matter of law, that the railroad company had not been negligent. In the *Lowell case*, as in this, it was shown that a rule of the company, applicable where double tracks were operated, prohibited any train, either passenger or freight, from attempting to run past a passenger train standing at a station for the purpose of receiving or discharging passengers, until the passenger train at the station had moved on, or signal was given by the conductor of the standing train for the other train to come ahead. Speaking of such a rule, and after declaring that it could not be seriously contended that the defendant was free from fault in failing to stop its train, in compliance with its own rule, the court said (page 217): "In view of the frequency of accidents occurring to passengers crossing one track at a station, after alighting from a train standing upon another track, the rule is doubtless a proper one, and if it had been observed on that evening this accident would probably not have occurred."

The cogency of this language applies with equal force to the state of facts disclosed in this record, where the station in which was the waiting room was so situated, and the trains of the company so operated, that passengers obliged to board a train which was to arrive and depart on the east track could not do so without crossing the west track, over which a train bound in an opposite direction was momentarily to arrive. If the stopping of a train at a station to put off a passenger, as held in the *Lowell case*, may, under certain circumstances, justify the passenger in presuming that it is safe for him to alight from the train away from a platform, and does not impose upon him in so doing the same degree of care and caution as would be imposed on him if he were not a passenger, it follows, necessarily, that the same rule would apply to one waiting at a station to take a train and who approaches the train he is to take when it arrives at the station.

The learned court below, in affirming the judgment of the trial court, principally rested its conclusion on the ruling in *Elliott v. Chicago, Milwaukee & St. Paul Railway*, 150 U. S.

## Opinion of the Court.

245, and the authorities in that case referred to. But there the question for determination was the negligence of one not a passenger.

The duty owing by a railroad company to a passenger, actually or constructively in its care, is of such a character that the rules of law regulating the conduct of a traveller upon the highway when about to cross and the trespasser who ventures upon the tracks of a railroad company are not a proper criterion by which to determine whether or not a passenger who sustains injury in going upon the tracks of the railroad was guilty of contributory negligence. A railroad company owes to one standing towards it in the relation of a passenger a different and higher degree of care from that which is due to mere trespassers or strangers, and it is conversely equally true that the passenger, under given conditions, has a right to rely upon the exercise by the road of care; and the question of whether or not he is negligent, under all circumstances, must be determined on due consideration of the obligations of both the company and the passenger. As said by the Court of Appeals of New York in *Terry v. Jewett*, 78 N. Y. 338, 344:

"There is a difference between the care and caution demanded in crossing a railroad track on a highway and in crossing while at a depot of a railroad company to reach the cars. No absolute rule can be laid down to govern the passenger in the latter case under all circumstances. While a passenger has a right to pass from the depot to the train on which such passenger intends to travel, and the company should furnish reasonable and adequate protection against accident in the enjoyment of this privilege, the passenger is bound to exercise proper care, prudence and caution in avoiding danger. The degree of care and caution must be governed in all cases by the extent of the peril to be encountered and the circumstances attending the exposure."

And in the case before the court it was held to be a question for the jury, under all the circumstances, whether the plaintiff was chargeable with contributory negligence.

The doctrine of the *Terry* case was approved in *Brassell v. New York Central &c. Railroad*, 84 N. Y. 246, and is sup-

## Opinion of the Court.

ported by the following authorities: *Atchison &c. Railroad v. Shean*, 18 Colorado, 368; *Phil. Wil. & Balt. Railroad v. Anderson*, 72 Maryland, 519, 530; *Balt. & Ohio Railroad v. State*, 60 Maryland, 449, 463, 465; *Pennslyvania Railroad v. White*, 88 Penn. St. 327, 333, 334; *Jewett v. Klein*, 27 N. J. Eq. 550; *Wheelock v. Boston & Albany Railroad*, 105 Mass. 203.

To concede the rule, and, in a given case, to take a passenger beyond its protection by holding that one who goes in proper time to a station for the purpose of taking a train over the road and has a ticket for travel thereon, is not to be considered as a passenger until he has manifested by some outward act his intention to board a train and become a passenger, is to admit the rule on the one hand and on the other to deny it. It is also clear that to say that one who goes to a station to take a train must exercise the same circumspection and care as a traveller on the highway or a trespasser, unless by some implication the corporation has invited the person to deport himself as a passenger, and that such implication must be determined as matter of law by the court and not of fact by the jury, is, in effect, under the form of a qualification, to destroy the rule.

The situation of the tracks, the location of the station building and the waiting room, the coming of the local train and its stopping to receive passengers in a position which required the latter to cross a track in order to reach the train, involved necessarily a condition of things, which under one view of the testimony constituted an implied invitation to the passenger to follow the only course which he could have followed in order to take the train, that is, to cross the track to the waiting train. Whilst it is true, as was said in *Terry v. Jewett, supra*, that such implied invitation would not absolve a passenger from the duty to exercise care and caution in avoiding danger, nevertheless it certainly would justify him in assuming that, in holding out the invitation to board the train, the corporation had not so arranged its business as to expose him to the hazard of danger to life and limb unless he exercised the very highest degree of care and caution.

## Opinion of the Court.

The railroad, under such circumstances, in giving the invitation, must necessarily be presumed to have taken into view the state of mind and of conduct which would be engendered by the invitation, and the passenger, on the other hand, would have a right to presume that in giving the invitation the railroad itself had arranged for the operation of its trains with proper care. The doctrine finds a very clear expression in a passage in the opinion in the *Terry case*, already referred to, where it was said (p. 342):

"It may be assumed that a railroad corporation, in the exercise of ordinary care, so regulates the running of its trains that the road is free from interruption or obstruction where passenger trains stop at a station to receive and deliver passengers. Any other system would be dangerous to human life, and impose great risks upon those who might have occasion to travel on the railroad."

When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. *Grand Trunk Railway v. Ives*, 144 U. S. 408, 417; *Baltimore & Ohio Railroad v. Griffith*, 159 U. S. 603, 611; *Texas & Pacific Railway v. Gentry*, 163 U. S. 353, 368. A like doctrine was thus expressed by the Supreme Court of Pennsylvania in *Pennsylvania Railroad Co. v. White*, 88 Penn. St. 327, 333, a case in many respects analogous to the present one:

"Negligence has been defined to be 'the absence of care according to the circumstances,' and is always a question for the jury when there is reasonable doubt as to the facts, or as to the inferences to be drawn from them. When the measure of duty is ordinary and reasonable care, and the degree of care varies according to circumstances, the question of negligence is necessarily for the jury."

We think the case presented by the record is not one where the facts inferable from the evidence were such that all reasonable men would, of necessity, draw the same conclusion from them, and the question of negligence was not, therefore, one of law for the court.

Statement of the Case.

It is, therefore, ordered that the judgment be  
*Reversed, and the case remanded, with directions to grant a new trial, and for further proceedings in conformity to law.*

MR. JUSTICE BREWER is of the opinion that the deceased was guilty of contributory negligence.

END OF CASE

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## WARNER v. BALTIMORE AND OHIO RAILROAD COMPANY.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 82. Argued November 1, 2, 1897. — Decided November 29, 1897.

This was an action to recover for the death of plaintiff's testator, caused by a train striking him while crossing the track of defendant's road. The results of the evidence at the trial are condensed in the statement of the case, below, which cannot well be abridged. Upon them the court below ordered a verdict and judgment in defendant's favor. *Held*, that the peremptory instruction by the trial court and the affirmance of its action by the appellate court manifestly proceeded not on the theory that, as a matter of law, there was no negligence on the part of the defendant, but that the proof of contributory negligence on the part of the plaintiff was so conclusive as to leave no question for the consideration of the jury;

THE ST. ANTHONY FALLS WATER POWER COMPANY, Appellant,  
*vs.*  
 BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, Respondent. } Cal. No. 326;  
 Reg. No. 8984

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon, pursuant to stipulation of counsel for the respective parties, this cause was placed upon the calendar of the April term of this court, A. D. 1894.

Now, after due deliberation thereon had, it is ordered that the judgment of the court below be, and the same is, affirmed for the reasons expressed in the former opinion of this court on the appeal from the order of the court below.

A true record.

Attest:

C. P. HOLCOMB, *Clerk.*

The foregoing is a full and true copy of the minutes of argument and order in the above-entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

C. P. HOLCOMB, *Clerk.*

[Endorsed:] 8984. State of Minnesota, supreme court. Copy of minutes of argument. Filed July 28, A. D. 1894. C. P. Holcomb, clerk.

136 STATE OF MINNESOTA :

Supreme Court, April Term, A. D. 1894.

THE ST. ANTHONY FALLS WATER POWER COMPANY, Appellant,  
*vs.*  
 THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, Respondent. } No. 326.

Pursuant to an order of court duly made and entered in this cause on the eighteenth day of July, A. D. 1894—

It is here and hereby determined and adjudged that the judgment of the court below herein appealed from, to wit, of the district court of the fourth judicial district, sitting within and for the county of Hennepin, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the respondent above named do have and recover of said The St. Anthony Falls Water Power Company, appellant herein, the sum and amount of thirty-one &  $\frac{5}{10}$  dollars (\$31.50), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 28th day of July, 1894.

By the court.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

C. P. HOLCOMB, *Clerk.*

*Statement for Judgment.*

Costs allowed by statute.....	\$25 00
Clerk's fees for making return.....	
Printer's fees.....	
Clerk's fees, supreme court.....	6 50
Filing mandate and docketing transcript.....	
Affidavits and acknowledgments.....	
Postage .....	
Copying return for printer.....	
	\$31 50

137 [Endorsed:] State of Minnesota, supreme court. The St. Anthony Falls Water Power Company, appellant, vs. The Board of Water Commissioners of St. Paul, resp't. Transcript of judgment.

STATE OF MINNESOTA, } ss:  
Supreme Court, }

I, C. P. Holcomb, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 28th day of July, A. D. 1894.

C. P. HOLCOMB, Clerk.

138 [Endorsed:] No. 8984. State of Minnesota, supreme court. The St. Anthony Falls Water Power Company, app't, against Board of Water Commissioners of St. Paul, respondent. Judgment-roll. Filed July 28th, 1894. C. P. Holcomb, clerk.

139 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1894.

JULY 18TH, A. D. 1894,  
Wednesday morning, 9.30 o'clock.

Court convened pursuant to adjournment, all the justices being present except Associate Justice Buck.

THE MINNEAPOLIS MILL COMPANY, Appellant,	vs.	Cal. No., 325;
BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, Respondent.		

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon, pursuant to stipulation of counsel for the respective

parties, this cause was placed upon the calendar of the April term of this court, A. D. 1894.

Now, after due deliberation thereon had, it is ordered that the judgment of the court below be, and the same is, affirmed for the reasons expressed in the former opinion of this court on the appeal from the order of the court below.

A true record.

Attest:

C. P. HOLCOMB, Clerk.

The foregoing is a full and true copy of the minutes of argument and order in the above-entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

C. P. HOLCOMB, Clerk.

[Endorsed:] 8983. State of Minnesota, supreme court. Copy of minutes of argument. Filed July 28, A. D. 1894. C. P. Holcomb, clerk.

#### 140 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1894.

THE MINNEAPOLIS MILL COMPANY, Appellant, <i>vs.</i> THE BOARD OF WATER COMMISSIONERS OF ST. PAUL, Respondent.	} No. 325.
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Pursuant to an order of court duly made and entered in this cause on the eighteenth day of July, A. D. 1894—

It is here and hereby determined and adjudged that the judgment of the court below herein appealed from, to wit, of the district court of the fourth judicial district, sitting within and for the county of Hennepin, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the respondent above named do have and recover of said Minneapolis Mill Company, appellant herein, the sum and amount of thirty-one &  $\frac{5}{10}$  dollars (\$31.50), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 28th day of July, 1894.

By the court.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

C. P. HOLCOMB, Clerk.

*Statement for Judgment.*

Costs allowed by statute.....	\$25 00
Clerk's fees for making return .....	
Printer's fees.....	
Clerk's fees, supreme court.....	6 50
Filing mandate and docketing transcript.....	
Affidavits and acknowledgments .....	
Postage .....	
Copying return for printer.....	
	\$31 50

141 [Endorsed:] State of Minnesota, supreme court. The Minneapolis Mill Company, appellant, vs. The Board of Water Commissioners of St. Paul, respondent. Transcript of judgment.

STATE OF MINNESOTA, } ss:  
Supreme Court, } ss:

I, C. P. Holcomb, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 28th day of July, A. D. 1894.

C. P. HOLCOMB, Clerk.

142 [Endorsed:] No. 8983. State of Minnesota, supreme court. The Minneapolis Mill Company, appellant, against The Board of Water Commissioners of St. Paul, respondent. Judgment-roll. Filed July 28th, 1894. C. P. Holcomb, clerk.

143 To the Honorable James Gilfillan, chief justice of the supreme court of the State of Minnesota:

The petition of the St. Anthony Falls Water Power Company, a corporation of the State of Minnesota, respectfully shows—

That on the 28th day of July, A. D. 1894, a final judgment was entered in said supreme court, the same being the tribunal having jurisdiction under the laws of said State of Minnesota to render final judgment in all proceedings of such nature, in an action or proceeding wherein this petitioner was plaintiff and The Board of Water Commissioners of the City of St. Paul, a corporation, was defendant.

That in and by said proceeding it was made to appear that said plaintiff, this petitioner, was the owner of a parcel of land abutting on the Mississippi river and on the easterly side thereof at and adjacent to the falls of St. Anthony, in said river and within the said State of Minnesota, upon which land and in the bed of said river

this petitioner had dams and other structures for the purpose of making use of the water power to be derived from the flow of the water of said river over said falls and adjacent to the land so owned by this petitioner, and that the said defendant was, by certain structures upon one of the streams tributary to said river and above said falls, *was* diverting a large amount of the water of said river which but for said diversion would flow in said river over said dams and structures of the petitioner, and so be made available for the use of this petitioner in the increase of its said water power.

And this petitioner further shows that in the said proceeding it claimed that by the construction and effect of the laws of the United States and the enactments of the Congress thereof regulating the sales of the public lands of the United States, including all the lands within said State of Minnesota abutting upon said Mississippi river and through which sales this petitioner derived its ownership of said parcel of land, that it, the said petitioner, plaintiff in said proceeding, was entitled to have and enjoy the full natural flow of the waters of said river and the right to make use of the same for the benefit of its water power and for all other useful purposes to which said flow is adapted without material diversion thereof by said defendant or any other person, and that the final judgment

144 and decision of said supreme court was against the right so claimed by this petitioner.

And this petitioner further shows that in the said proceeding it was further claimed by this petitioner, as such plaintiff, that by the construction and effect of that special enactment of the legislative assembly of the Territory of Minnesota entitled An act to incorporate the St. Anthony Falls Water Power Company, approved February 26, 1857, there was granted to this petitioner by said legislative assembly in the exercise of authority granted said assembly by the laws of the United States, which enactments were made subject to the revision and approval of the Congress of the United States, the right and authority to erect dams in the bed of said Mississippi river adjacent to its said lands abutting on said river for the purpose of improving the said water power, together with the right to make use of the water flowing in said Mississippi river and the whole thereof, and the right to have and enjoy the use of all the water which would naturally flow in said river without any material diversion thereof by defendant or any other person, and that the final judgment and decision of said supreme court in said proceeding was against the right so claimed by this petitioner.

And this petitioner further shows that in the said proceeding it was further claimed by this petitioner, as such plaintiff, that by the construction and effect of the laws and statutes of the Congress of the United States authorizing the people of Minnesota to form a constitution and State government preparatory to admission into the Union and admitting Minnesota into the Union this petitioner's rights to the use of all the water naturally flowing in said Mississippi river past its said riparian lands was not subject and could not be made subject to the use and diversion shown to have been made by defendant, Board of Water Commissioners, and that the

final judgment — decision of said supreme court in said proceeding was against the right so claimed by this petitioner.

And this petitioner further shows that in and by said proceeding said defendant claimed the right to divert said waters from the natural flow of the waters of said Mississippi river by virtue of a grant from the legislature of the State of Minnesota by the act

entitled "An act to amend and to consolidate an act to au-  
145 thorize the city of St. Paul to purchase the franchise and  
property of the St. Paul Water Company and creating a board  
of water commissioners, approved February 10, 1881, and the act  
amendatory thereof, approved the 25th day of January, A. D. 1883,"  
approved March 4, 1885; and this petitioner claimed that the said  
enactment of the said legislature of the State of Minnesota was and  
is inoperative and void, inasmuch as the same is contrary to the  
provisions of section 1, article XIV, of the Constitution of the United  
States, which provides that no State shall make or enforce any law  
which shall abridge a privilege or immunity of any citizen of the  
United States, nor shall any State deprive any person of life, liberty,  
or property without due process of law, nor deny to any person  
within its jurisdiction the equal protection of the laws; and this  
petitioner further claimed on said trial and in said proceeding that  
the enactment was also contrary to section 14 of article I of said  
Constitution of the United States, which provides that no State shall  
pass any law impairing the obligation of contracts, inasmuch as it  
impaired the force of the contract made with this petitioner by the  
act of its incorporation, being the same act of the legislative assembly  
of the Territory of Minnesota hereinabove referred to; but the  
final judgment and decision of said supreme court of Minnesota was  
in favor of the claims of said defendant under the said enactment  
and against the claims of this petitioner that said enactment was  
invalid.

All which claims and decisions more fully appear by the records  
of said proceeding now remaining in said supreme court.

Wherefore, forasmuch as your petitioner believes there was mani-  
fest error in the said decisions of said court against the said several  
claims of this petitioner, as hereinabove set forth, and in the final  
judgment in said action or proceeding, which is to the great damage  
of this petitioner, this petitioner prays that your honor will examine  
the records of said supreme court of Minnesota in that behalf  
and allow to this petitioner a writ of error, to the end that said  
146 judgment and record may be brought before the Supreme  
Court of the United States, agreeable to the laws of the United  
States in that behalf enacted.

ST. ANTHONY FALLS WATER  
POWER CO., *Petitioner,*  
By WM. DE LA BARRE, *Treas.*

BENTON, ROBERTS & BROWN,  
*Attorneys for Petitioner.*

STATE OF MINNESOTA, }  
 County of Hennepin, }<sup>ss:</sup>

Wm. de la Barre, being duly sworn, on oath states that he resides in Hennepin county and is the treasurer of the petitioner corporation named in the above petitioner; that he has subscribed to the same; that he has read said petition and knows the contents thereof, and that the same is true to the knowledge of deponent.

WM. DE LA BARRE.

Subscribed and sworn to before me this 9th day of August, 1894.

[NOTARIAL SEAL.]

ROME G. BROWN,

*Notary Public, Hennepin Co., Minn.*

Upon reading the above petition, upon said petition and upon the record submitted therewith, I hereby allow the writ of error prayed for therein.

JAMES GILFILLAN,

*Chief Justice Supreme Court State of Minnesota.*

147 [Endorsed:] 8984. State of Minnesota, supreme court. St. Anthony Falls Water Power Company, petitioner, vs. Board of Water Commissioners of the City of St. Paul. Petition for writ of error. Benton, Roberts & Brown, attorneys for petitioner, 1004 Guaranty Loan building, Minneapolis, Minn.

Endorsed · Filed Aug. 9, 1894. C. P. Holcomb, clerk.

148 To the Honorable James Gilfillan, chief justice of the supreme court of the State of Minnesota:

The petition of the Minneapolis Mill Company, a corporation of the State of Minnesota, respectfully shows—

That on the 28th day of July, A. D. 1894, a final judgment was entered in said supreme court, the same being the tribunal having jurisdiction under the laws of said State of Minnesota to render final judgment in all proceedings of such nature, in an action or proceeding wherein this petitioner was plaintiff and The Board of Water Commissioners of the City of St. Paul, a corporation, was defendant.

That in and by said proceeding it was made to appear that said plaintiff, this petitioner, was the owner of a parcel of land abutting on the Mississippi river and on the westerly side thereof at and adjacent to the falls of St. Anthony, in said river and within the said State of Minnesota, upon which land and in the bed of said river this petitioner had dams and other structures for the purpose of making use of the water power to be derived from the flow of the water of said river over said falls and adjacent to the land so owned by this petitioner, and that the said defendant was by certain structures upon one of the streams tributary to said river and above said falls was diverting a large amount of the water of said river, which but for said diversion would flow in said river over said dams and structures of the petitioner, and so be made available for the use of this petitioner in the increase of its said water power.

And this petitioner further shows that in the said proceeding it claimed that by the construction and effect of the laws of the United States and the enactments of the Congress thereof regulating the sales of the public lands of the United States, including all the lands within said State of Minnesota abutting upon said Mississippi river, and through which sales this petitioner derived its ownership of said parcel of land, that it, the said petitioner, plaintiff in said proceeding, was entitled to have and enjoy the full natural flow of the waters of said river and the right to make use of the same for the benefit of its water power and for all other useful purposes to which said flow is adapted without material diversion thereof by said defendant or any other person, and that the  
149 final judgment and decision of said supreme court was against the right so claimed by this petitioner.

And this petitioner further shows that in the said proceeding it was further claimed by this petitioner, as such plaintiff, that by the construction and effect of that special enactment of the legislative assembly of the Territory of Minnesota entitled An act to incorporate the Minneapolis Mill Company, approved February 27, 1856, there was granted to this petitioner by said legislative assembly, in the exercise of authority granted said assembly by the laws of the United States, which enactments were made subject to the revision and approval of the Congress of the United States, the right and authority to erect dams in the bed of said Mississippi river adjacent to its said lands abutting on said river, for the purpose of improving the said water power, together with the right to make use of the water flowing in said Mississippi river and the whole thereof, and the right to have and enjoy the use of all the water which would naturally flow in said river without any material diversion thereof by defendant or any other person, and that the final judgment and decision of said supreme court in said proceeding was against the right so claimed by this petitioner.

And this petitioner further shows that in the said proceeding it was further claimed by this petitioner, as such plaintiff, that by the construction and effect of the laws and statutes of the Congress of the United States authorizing the people of Minnesota to form a constitution and State government preparatory to admission into the Union and admitting Minnesota into the Union this petitioner's rights to the use of all the water naturally flowing in said Mississippi river past its said riparian lands was not subject and could not be made subject to the use and diversion shown to have been made by defendant, Board of Water Commissioners, and that final judgment — decision of said supreme court in said proceeding was against the right so claimed by this petitioner.

And this petitioner further shows that in and by said proceeding said defendant claimed the right to divert said waters from the natural flow of the waters of said Mississippi river by virtue of a grant from the legislature of the State of Minnesota by the act entitled "An act to amend and to consolidate an act to authorize  
150 the city of St. Paul to purchase the franchise and property of the St. Paul Water Company, and creating a board of

water commissioners, approved February 10, 1881, and the act amendatory thereof, approved the 25th day of January, A. D. 1883," approved March 4, 1885; and this petitioner claimed that the said enactment of the said legislature of the State of Minnesota was and is inoperative and void, inasmuch as the same is contrary to the provisions of section 1, article XIV, of the Constitution of the United States, which provides that no State shall make or enforce any law which shall abridge a privilege or immunity of any citizen of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and this petitioner further claimed on said trial and in said proceeding that the enactment was also contrary to section 14 of article I of said Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, inasmuch as it impaired the force of the contract made with this petitioner by the act of its incorporation, being the same act of the legislative assembly of the Territory of Minnesota hereinabove referred to; but the final judgment and decision of said supreme court of Minnesota was in favor of the claims of said defendant under the said enactment and against the claims of this petitioner that said enactment was invalid.

All which claims and decisions more fully appear by the records of said proceeding now remaining in said supreme court.

Wherefore, forasmuch as your petitioner believes there was manifest error in the said decisions of said court against the said several claims of this petitioner as hereinabove set forth and in the final judgment in said action or proceeding, which is to the great damage of this petitioner, this petitioner prays that your honor will examine the records of said supreme court of Minnesota in that behalf and allow to this petitioner a writ of error, to the end that said judgment and record may be brought before the Supreme Court of the United States, agreeable to the laws of the United States in that behalf enacted.

MINNEAPOLIS MILL CO., *Petitioner,*  
By WM. DE LA BARRE, *Treas.*

BENTON, ROBERTS & BROWN,  
*Attorney for Petitioner.*

STATE OF MINNESOTA, <sup>1<sup>ss</sup></sup> ;  
*County of Hennepin, } ss:*

Wm. de la Barre, being duly sworn, on oath states that he resides in Hennepin county and is the treasurer of the petitioner corporation named in the above petition; that he has subscribed to the same; that he has read said petition and knows the contents thereof, and that the same is true to the knowledge of deponent.

WM. DE LA BARRE.

Subscribed and sworn to before me this 9th day of August, 1894.  
[NOTARIAL SEAL.] ROME G. BROWN,

*Notary Public, Hennepin Co., Minn.*

Upon reading the above petition, upon said petition and upon the record submitted therewith, I hereby allow the writ of error prayed for therein.

JAMES GILFILLAN,  
*Chief Justice Supreme Court, State of Minnesota.*

152 [Endorsed:] 8983. Supreme court of the State of Minnesota. Minneapolis Mill Company, petitioner, vs. Board of Water Commissioners of the City of St. Paul. Petition for writ of error. Benton, Roberts & Brown, attorneys for petitioner, 1004 Guaranty Loan building, Minneapolis, Minn.

Endorsed: Filed August 9, 1894. C. P. Holecomb, clerk.

153 Know all men by these presents that we, The St. Anthony Falls Water Power Company of Minneapolis, Minnesota, as principal, and Charles A. Pillsbury and William de la Barre, both of Minneapolis, as sureties, are held and firmly bound unto The Board of Water Commissioners of the City of St. Paul in the full and just sum of one thousand dollars, to be paid to the said Board of Water Commissioners of the City of St. Paul, their attorneys, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of August, 1894.

Whereas, in the supreme court of the State of Minnesota, in a suit pending in said court between the said St. Anthony Falls Water Power Company, as plaintiff and appellant, and the said Board of Water Commissioners of the City of St. Paul, as defendant and respondent, judgment was rendered against the said St. Anthony Falls Water Power Company, whereby a certain judgment of the district court of the fourth judicial district in and for the county of Hennepin, Minnesota, dismissing said action and for thirty-three dollars and three cents as costs and disbursements of said suit, was affirmed by said supreme court, and awarding judgment against the said St. Anthony Falls Water Power Company for the costs and disbursements of said proceeding, taxed at thirty-one dollars and fifty cents, and the said St. Anthony Falls Water Power Company, plaintiff, appellant, having obtained a writ of error, and filed the same in the clerk's office of said supreme court, to reverse the judgment in said court, and a citation directed to Board of Water Commissioners of the City of St. Paul, the defendant and respondent aforesaid, citing and admonishing said Board of Water Commissioners of the City of St. Paul to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said St. Anthony Falls Water Power Company shall prosecute said writ of error to effect and answer and pay all damages and costs if it fail

154 to make its appeal good, then the above obligation to be void; otherwise to remain in full force and effect.

[SEAL.]

ST. ANTHONY FALLS WATER  
POWER COMPANY,  
By WM. DE LA BARRE, *Its Treasurer.*  
CHAS. A. PILLSBURY.  
WM. DE LA BARRE.

Signed, sealed, and delivered in presence of—

L. P. HUBBARD.  
ROME G. BROWN.

STATE OF MINNESOTA, }  
*County of Hennepin,* } ss:

On this 9th day of August, 1894, before me, a notary public within and for said county, personally appeared Charles A. Pillsbury and William de la Barre, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed; and on the same day before me appeared William de la Barre, to me personally known, who, being by me duly sworn, did say that he is the treasurer of the St. Anthony Falls Water Power Company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said William de la Barre acknowledged said instrument to be the free act and deed of said corporation.

ROME G. BROWN,

[NOTARIAL SEAL.] Notary Public, Hennepin Co., Minn.

155 STATE OF MINNESOTA, }  
*County of Hennepin,* } ss:

Charles A. Pillsbury and Wm. de la Barre, being duly sworn, says, each for himself, that he is one of the sureties above named; that he is a resident and freeholder of the State of Minnesota and worth the amount of one thousand dollars specified in the foregoing bond above his debts and liabilities and exclusive of his property exempt from execution.

CHARLES A. PILLSBURY,  
WM. DE LA BARRE.

Subscribed and sworn to before me this 9th day of August, 1894.

[NOTARIAL SEAL.]

ROME G. BROWN,  
Notary Public, Hennepin Co., Minn.

I hereby approve the foregoing bond both as to the form and sufficiency of its sureties.

LEON T. CHAMBERLAIN,  
WALTER L. CHAPIN,  
*Attorneys for Defendant in Error.*

The above bond approved by me—

JAMES GILFILLAN,  
*Chief Justice Supreme Court State of Minnesota.*

156 [Endorsed:] 8984. Supreme Court of the United States.  
St. Anthony Falls Water Power Company, plaintiff in error,  
vs. Board of Water Commissioners of the City of St. Paul, defendant  
in error. Bond on writ of error.

Endorsed: Filed August 9, 1894. C. P. Holcomb, clerk.

157 Know all men by these presents that we, The Minneapolis Mill Company of Minneapolis, Minnesota, as principal, and Charles A. Pillsbury and Wm. de la Barre, both of Minneapolis, as sureties, are held and firmly bound unto The Board of Water Commissioners of the City of St. Paul in the full and just sum of one thousand dollars, to be paid to the said Board of Water Commissioners of the City of St. Paul, their attorneys, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of August, 1894.

Whereas, in the supreme court of the State of Minnesota, in a suit pending in said court between the said Minneapolis Mill Company, as plaintiff and appellant, and the said Board of Water Commissioners of the City of St. Paul, as defendant and respondent, judgment was rendered against the said Minneapolis Mill Company, whereby a certain judgment of the district court of the fourth judicial district in and for the county of Hennepin, Minnesota, dismissing said action and for *ninety* thirty-three dollars and three cents as costs and disbursements of said suit, was affirmed by said supreme court, and awarding judgment against the said Minneapolis Mill Company for the costs and disbursements of said proceeding, taxed at thirty-one dollars and fifty cents, and the said Minneapolis Mill Company, plaintiff, appellant, having obtained a writ of error and filed the same in the clerk's office of said supreme court to reverse the judgment in said court, and a citation directed to Board of Water Commissioners of the City of St. Paul, the defendant and respondent aforesaid, citing and admonishing said Board of Water Commissioners of the City of St. Paul to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Minneapolis Mill Company shall prosecute said writ of error to effect and answer and pay all damages and costs if it fail to make its appeal good, then the above obligation to be void; otherwise to remain in full force and effect.

[SEAL.] MINNEAPOLIS MILL COMPANY,  
By CHARLES A. PILLSBURY, *Its Pres't.*  
CHAS. A. PILLSBURY,  
WM. DE LA BARRE.

Signed, sealed, and delivered in presence of—

L. P. HUBBARD.  
ROME G. BROWN.

STATE OF MINNESOTA, } ss:  
*County of Hennepin,* }

On this 9th day of August, 1894, before me, a notary public within and for said county, personally appeared Charles A. Pillsbury and William de la Barre, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed; and on the same day before me appeared Charles A. Pillsbury, to me personally known, who, being by me duly sworn, did say that he is the president of the Minneapolis Mill Company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said — — acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.]

ROME G. BROWN,  
*Notary Public, Hennepin Co., Minn.*

159 STATE OF MINNESOTA, } ss:  
*County of Hennepin,* }

Charles A. Pillsbury and Wm. de la Barre, being duly sworn, each for himself, says that he is one of the sureties above named; that he is a resident and freeholder of the State of Minnesota and worth the amount of one thousand dollars specified in the foregoing bond above his debts and liabilities and exclusive of his property exempt from taxation.

CHARLES A. PILLSBURY.  
 WM. DE LA BARRE.

Subscribed and sworn to before me this 9th day of August, 1894.

[NOTARIAL SEAL.]

ROME G. BROWN,  
*Notary Public, Hennepin Co., Minn.*

I hereby approve the foregoing bond both as to the form and sufficiency of its sureties.

LEON T. CHAMBERLAIN,  
 WALTER L. CHAPIN,  
*Attorney for Defendant in Error.*

The above bond approved by me—

JAMES GILFILLAN,  
*Chief Justice Supreme Court State of Minnesota.*

160 [Endorsed:] 8983. Supreme Court of the United States  
 Minneapolis Mill Company, plaintiff in error, vs. Board of  
 Water Commissioners of the City of St. Paul, defendant in error.  
 Bond on writ of error.

Endorsed: Filed August 9, 1894. C. P. Holcomb, clerk.

161 In the Supreme Court of the United States.

ST. ANTHONY FALLS WATER POWER COMPANY, Plaintiff in Error, }  
vs.  
THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, }  
Defendant in Error.

Writ of error to the supreme court of the State of Minnesota.

*Assignment of Errors.*

The said plaintiff in error, by Reuben C. Benton, its attorney, comes and says that in the record and proceedings in the said suit in said supreme court of the State of Minnesota there is manifest error in this :

I.

That the said court held the statutes of Minnesota entitled "An act to amend and consolidate an act to authorize the city of St. Paul to purchase the franchise and property of the St. Paul Water Company, and creating a board of water commissioners, approved February 10, 1881, and the act amendatory thereof approved the 25th day of January, A. D. 1883," approved March 4th, 1885, being chapter 110 of the Special Laws of Minnesota of the Year 1885, in so far as it authorized the diversion of water by said defendant in error from the Mississippi river above the water power of plaintiff in error without compensation to plaintiff in error, to be valid and not in conflict with the provisions of the Constitution of the United States, whereas the said act was invalid and contrary to the provisions of the Constitution of the United States on each of the following grounds :

1. That in so authorizing such diversion the said act is contrary to section 1 of article XIV of the Constitution of the United States in that it deprives said plaintiff in error of its property without due process of law.

2. That the said act is contrary to the provisions of section 1, article XIV, of the Constitution of the United States in that it abridges the privileges and immunities of the plaintiff in error, a citizen of the United States.

3. That said act is contrary to the provisions of section 1, article XIV, of the Constitution of the United States in that it denies to the plaintiff in error the equal protection of the laws.

162 4. That said act is contrary to the provisions of section 14 of article I of the Constitution of the United States in that it impairs the obligation of the contract rights of plaintiff in error which are vested in plaintiff in error by virtue of its charter.

II.

The said supreme court erred in holding that by the construction and effect of the charter of this plaintiff in error, being the act en-

titled "An act to incorporate the St. Anthony Falls Water Power Company," approved February 26th, 1857, the same being chapter 137 of the laws passed by the legislative assembly of the Territory of Minnesota, under and by virtue of an authority of the statutes of the United States, that the said plaintiff in error did not have a vested right to the use of all the waters naturally flowing past its lands and structures in the Mississippi river not subject to a diversion by defendant in error above the lands and structures of said plaintiff in error without compensation to the said plaintiff in error.

### III.

1. In holding that by the construction and effect of the statutes of the United States authorizing the people of Minnesota to form a public government and providing for the admission of the State of Minnesota into the Union that the State of Minnesota is not restricted and prohibited from any interest or use of the waters of the Mississippi river which are in conflict with or in derogation of the use of said Mississippi river as a public highway, and that by the said statutes of the United States the said State of Minnesota is not prohibited and forbidden from diverting said waters and from authorizing a diversion of said waters for the uses of defendant in error such as are shown in the record.

2. In holding that by the construction and effect of the said statutes of the United States the rights of the plaintiff in error to the use of the waters naturally flowing in said Mississippi river past its lands and structures was subject to the right of the State to make or authorize to be made a diversion of such waters for the use of the defendant in error.

### 163

### IV.

1. The said court erred further in holding that by the construction and effect of the statutes of the United States relating to the sale of public lands plaintiff in error did not acquire nor hold, by virtue of the original patents from the United States of lands upon the Mississippi river as appurtenant and parcel of those lands, the rights to the use of waters of said river naturally flowing past its said lands and not subject to the diversion by defendant in error without compensation to plaintiff in error.

2. Said court erred in holding that by the construction and effect of the said statutes of the United States plaintiff in error did not acquire nor hold, by virtue of the original patents from the United States of lands on the Mississippi river as appurtenant and parcel of those lands, the right to the use of waters of said river naturally flowing past its said lands and not subject to any right, title, or interest in the State of Minnesota or the people thereof, to divert said waters or to authorize such diversion for the purposes and in the manner shown in the record herein, without compensation to plaintiff in error.

Wherefore the said plaintiff in error prays that said judgment of the supreme court of the State of Minnesota be reversed and an-

nulled, and that said plaintiff in error may be restored to all things which it has lost by reason of said judgment, and that judgment be rendered in its favor and against said defendant in error.

REUBEN C. BENTON,  
BENTON, ROBERTS & BROWN,  
*Attorneys for said Plaintiff in Error.*

164 [Endorsed:] 8984. Supreme Court of the United States.  
St. Anthony Falls Water Power Company, plaintiff in error,  
vs. Board of Water Commissioners of the City of St. Paul, defendant  
in error. Assignment of errors.

Endorsed: Filed August 9, 1894. C. P. Holcomb, clerk.

165 In the Supreme Court of the United States.

MINNEAPOLIS MILL COMPANY, Plaintiff in Error, }  
vs. }  
THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL, }  
Defendant in Error. }

Writ of error to the supreme court of the State of Minnesota.

*Assignment of Errors.*

The said plaintiff in error, by Reuben C. Benton, its attorney, comes and says that in the record and proceedings in the said suit in said supreme court of the State of Minnesota there is manifest error in this:

I.

That the said court held the statute of Minnesota entitled "An act to amend and consolidate an act to authorize the city of St. Paul to purchase the franchise and property of the St. Paul Water Company and creating a board of water commissioners, approved February 10, 1881, and the act amendatory thereof approved the 25th day of January, A. D. 1883," approved March 4th, 1885, being chapter 119 of the Special Laws of Minnesota of the Year 1885, in so far as it authorized the diversion of water by said defendant in error from the Mississippi river above the water power of plaintiff in error without compensation to plaintiff in error, to be valid and not in conflict with the provisions of the Constitution of the United States, whereas the said act was invalid and contrary to the provisions of the Constitution of the United States on each of the following grounds:

1. That in so authorizing such diversion the said act is contrary to section 1 of article XIV of the Constitution of the United States in that it deprives said plaintiff in error of its property without due process of law.
2. That the said act is contrary to the provisions of section 1, article XIV, of the Constitution of the United States in that it abridges the privileges and immunities of the plaintiff in error, a citizen of the United States.

3. That said act is contrary to the provisions of section 1, article XIV, of the Constitution of the United States in that it denies to the plaintiff in error the equal protection of the laws.

166 4. That said act is contrary to the provisions of section 14 of article I of the Constitution of the United States in that it impairs the obligation of the contract right of the plaintiff in error which are vested in plaintiff in error by virtue of its charter.

## II.

The said supreme court erred in holding that by the construction and effect of the charter of this plaintiff in error, being the act entitled "An act to incorporate the Minneapolis Mill Company," approved February 27th, 1856, the same being chapter 145 of the laws passed by the legislative assembly of the Territory of Minnesota, under and by virtue of an authority of the statutes of the United States, that the said plaintiff in error did not have a vested right to the use of all the waters naturally flowing past its lands and structures in the Mississippi river not subject to a diversion by defendant in error above the lands and structures of said plaintiff in error without compensation to the said plaintiff in error.

## III.

1. In holding that by the construction and effect of the statutes of the United States authorizing the people of Minnesota to form a public government and providing for the admission of the State of Minnesota into the Union that the State of Minnesota is not restricted and prohibited from any interest or use of the waters of the Mississippi river which are in conflict with or in derogation of the use of said Mississippi river as a public highway, and that by the said statutes of the United States the said State of Minnesota is not prohibited and forbidden from diverting said waters and from authorizing a diversion of said waters for the uses of defendant in error such as are shown in the record.

2. In holding that by the construction and effect of the said statutes of the United States the rights of the plaintiff in error to the use of the waters naturally flowing in said Mississippi river past its lands and structures was subject to the right of the State to make or authorize to be made a diversion of such waters for the use of the defendant in error.

## IV.

1. The said court erred further in holding that by the construction and effect of the statutes of the United States relating to the sale of public lands plaintiff in error did not acquire nor hold, by virtue of the original patents from the United States of lands upon the Mississippi river as appurtenant and parcel of those lands, the right to the use of waters of said river naturally flowing past its said lands and not subject to the diversion by defendant in error without compensation to the plaintiff in error.

2. Said court erred in holding that by the construction and effect of the said statutes of the United States plaintiff in error did not acquire nor hold, by virtue of the original patents from the United States of lands on the Mississippi river as appurtenant and parcel of those lands, the right to the use of waters of said river naturally flowing past its said lands and not subject to any right, title, or interest in the State of Minnesota or the people thereof to divert said waters or to centralize such diversion for the purposes and in the manner shown in the record herein, without compensation to plaintiff in error.

Wherefore the said plaintiff in error prays that said judgment of the supreme court of the State of Minnesota be reversed and annulled, and that said plaintiff in error may be restored to all things which it has lost by reason of said judgment, and that judgment be rendered in its favor and against said defendant in error.

REUBEN C. BENTON,  
BENTON, ROBERTS & BROWN,  
*Attorneys for Plaintiff in Error.*

168 [Endorsed:] 8983. Supreme Court of the United States.  
Minneapolis Mill Company, plaintiff in error, vs. Board of Water Commissioners of the City of St. Paul, defendant in error.  
Assignment of errors.

Endorsed: Filed August 9, 1894. C. P. Holcomb, clerk.

169 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said supreme court of the State of Minnesota, before you or some of you, being the highest court of law or equity in the said State in which a decision could be had in the said suit between The St. Anthony Falls Water Power Company, a corporation, plaintiff, appellant, and The Board of Water Commissioners of the City of St. Paul, defendant, respondent, wherein was drawn in question the validity of a statute of and an authority exercised under said State, on the ground of their being repugnant to the Constitution and laws of the United States, and the said decision was in favor of such their validity, and wherein was drawn in question the construction and effect of certain statutes of the United States and the decision was against the title, right, and privilege specially set up and claimed under the said statutes of the United States, and manifest error hath happened, to the great damage of the said St. Anthony Falls Water Power Company, as by its complaint appears, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to

the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the U.S. Circuit Court Seal, Supreme Court of the United States, this Dist. of Minnesota, 9th day of Aug., in the year of our Lord Third Division. one thousand eight hundred and ninety-four, and of the Independence of the United States the —.

OSCAR B. HILLIS,  
*Clerk of the Circuit Court of the United States of America for the District of Minnesota.*

The foregoing writ allowed by me this 9th day of August, A. D. 1894.

JAMES GILFILLAN,  
*Chief Justice of the Supreme Court of the State of Minnesota.*

170 [Endorsed:] 8984. Original. Supreme Court of the United States. St. Anthony Falls Water Power Company, plaintiff in error, vs. Board of Water Commissioners of the City of St. Paul, defendant in error. Writ of error. Filed August 9, 1894. C. P. Holcomb, clerk.

#### 171 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said supreme court of the State of Minnesota, before you or some of you, being the highest court of law or equity in the said State in which a decision could be had in the said suit between The Minneapolis Mill Company, a corporation, plaintiff, appellant, and The Board of Water Commissioners of the City of St. Paul, defendant, respondent, wherein was drawn in question the validity of a statute of and an authority exercised under said State, on the ground of their being repugnant to the Constitution and laws of the United States, and the said decision was in favor of such their validity, and wherein was drawn in question the construction and effect of certain statutes of the United States and the decision was against the title, right, and privilege specially set up and claimed under the said statutes of the United States, and manifest error hath happened, to the great damage of the said Minneapolis Mill Company, as by its complaint appears, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid

in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this U.S. Circuit Court Seal, 9th day of Aug., in the year of our Lord Dist. of Minnesota, one thousand eight hundred and ninety-four, and of the Independence of the United Third Division. States the —

OSCAR B. HILLIS,  
*Clerk of the Circuit Court of the United States of America for the District of Minnesota.*

The foregoing writ allowed by me this 9th day of August, A. D. 1894.

JAMES GILFILLAN,  
*Chief Justice Supreme Court State of Minnesota.*

172 [Endorsed:] Original. 8983. Supreme Court of the United States. Minneapolis Mill Company, plaintiff in error, vs. Board of Water Commissioners of the City of St. Paul, defendant in error. Writ of error. Filed August 9, 1894. C. P. Holecomb, clerk.

#### 173 THE UNITED STATES OF AMERICA:

The President of the United States to the Board of Water Commissioners of the City of St. Paul, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota in an action wherein The St. Anthony Falls Water Power Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable James Gilfillan, chief justice of the supreme court of the State of Minnesota, this 9th day of August, in the year of our Lord one thousand eight hundred and ninety-four.

JAMES GILFILLAN,  
*Chief Justice of the Supreme Court, State of Minnesota.*

Due and personal service of the above citation is hereby admitted this 9th day of August, 1894.

LEON T. CHAMBERLAIN,  
WALTER L. CHAPIN,  
*Attorney for Defendant in Error.*

174 STATE OF MINNESOTA, {  
*County of Ramsey,* }<sup>ss</sup>:

Rome G. Brown, being first duly sworn, on his oath says that at the city of St. Paul, Ramsey county, Minnesota, on the tenth day of August, 1894, he served the within citation upon The Board of Water Commissioners of the City of St. Paul, defendant in error, by handing to and leaving with John Caulfield, the secretary of said board of water commissioners, a true and correct copy of said citation, and deponent did at the same time show to said Caulfield this original citation and the signature of Chief Justice Gilfillan attached thereto.

ROME G. BROWN.

Subscribed and sworn to before me this tenth day of August, 1894.

[Notarial Seal, Ramsey County, Minn.]

WALTER L. CHAPIN,  
*Notary Public, Ramsey County, Minn.*

175 [Endorsed:] Original. 8984. Supreme Court of the United States. St. Anthony Falls Water Power Company, plaintiff in error, vs. Board of Water Commissioners of the City of St. Paul, defendant in error. Citation and proof of service. Filed August 9, 1894. C. P. Holeomb, clerk.

176 THE UNITED STATES OF AMERICA:

The President of the United States to the Board of Water Commissioners of the City of St. Paul, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota in an action wherein The Minneapolis Mill Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable James Gilfillan, chief justice of the supreme court of the State of Minnesota, this 9th day of August, in the year of our Lord one thousand eight hundred and ninety-four.

JAMES GILFILLAN,  
*Chief Justice of the Supreme Court, State of Minnesota.*

Due and personal service of the above citation is hereby admitted this 9th day of August, 1894.

LEON T. CHAMBERLAIN,  
WALTER L. CHAPIN,  
*Attorneys for Defendant in Error.*

177 STATE OF MINNESOTA, }  
County of Ramsey, } ss:

Rome G. Brown, being first duly sworn, on his oath says that at the city of St. Paul, Ramsey county, Minnesota, on the tenth day of August, 1894, he served the within citation upon The Board of Water Commissioners of the City of St. Paul, defendant in error, by handing to and leaving with John Caulfield, the secretary of said board of water commissioners, a true and correct copy of said citation, and deponent did at the same time show to said Caulfield this original citation and the signature of Chief Justice Gilfillan attached thereto.

ROME G. BROWN.

Subscribed and sworn to before me this tenth day of August, 1894.

[Notarial Seal, Ramsey County, Minn.]

WALTER L. CHAPIN,  
*Notary Public, Ramsey County, Minn.*

178 [Endorsed:] 8983. Original. Supreme Court of the United States. Minneapolis Mill Company, plaintiff in error, vs. Board of Water Commissioners of the City of St. Paul, defendant in error. Citation and proof of service. Filed August 9, 1894. C. P. Holcomb, clerk.

179 State of Minnesota Supreme Court.

STATE OF MINNESOTA, }  
Office of Clerk of Supreme Court, } ss:

I, C. P. Holcomb, clerk of the supreme court of the State of Minnesota, do hereby certify and return to the Supreme Court of the United States that the foregoing and annexed transcript of record is a full and complete transcript of the record, judgment, judgment-roll, and all of the proceedings had in the said supreme court of the State of Minnesota in the case between The Saint Anthony Falls Water Power Company, plaintiff, appellant, against The Board of Water Commissioners of the City of St. Paul, defendant, respondent, and in the case of The Minneapolis Mill Company, plaintiff, appellant, against The Board of Water Commissioners of the City of St. Paul, defendant, respondent, including the opinion of the said supreme court therein, as appears from the original files and records of said supreme court of the State of Minnesota.

And I do further certify and return that I have annexed to said transcript and included therewith, and that the foregoing are, copies

of the petitions for writs of error, bonds on writs of error and approvals thereof, assignments of error in both of said causes, as the same remain on file and of record in said supreme court of the State of Minnesota, and the original writs of error from the Supreme Court of the United States and the original citations issued thereon, with proof of service thereof, in both said causes, and that the foregoing constitutes a true, full, and complete return to said writs of error.

In witness whereof I have hereunto set my hand and the seal of said supreme court of the State of Minnesota, at the capitol, at Saint Paul, Minnesota, this 21st day of August, A. D. 1894.

[Seal of the Supreme Court, State of Minnesota.]

C. P. HOLCOMB,  
*Clerk of the Supreme Court of the State of Minnesota.*

Endorsed on cover: Case No. 15,683. Minnesota supreme court. Term No., 168. The St. Anthony Falls Water Power Company, plaintiff in error, vs. The Board of Water Commissioners of the City of St. Paul. Case No. 15,684. Term No., 169. The Minneapolis Mill Company, plaintiff in error, vs. The Board of Water Commissioners of the City of St. Paul. Filed September 17, 1894.





N<sup>o</sup>. 23. <sup>nd</sup> 24.

FILED

SEP 27 1897

JAMES H. McKENNEY

CJ

~~Brief of Brown for O. S.~~

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1897.

~~Filed Sept. 27, 1897.~~

No. 23.

THE ST. ANTHONY FALLS WATER POWER  
COMPANY, PLAINTIFF IN ERROR,

*vs.*

THE BOARD OF WATER COMMISSIONERS OF  
THE CITY OF ST. PAUL.

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No. 24.

THE MINNEAPOLIS MILL COMPANY,  
PLAINTIFF IN ERROR,

*vs.*

THE BOARD OF WATER COMMISSIONERS OF  
THE CITY OF ST. PAUL.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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**BRIEF AND ARGUMENT  
FOR PLAINTIFFS IN ERROR.**

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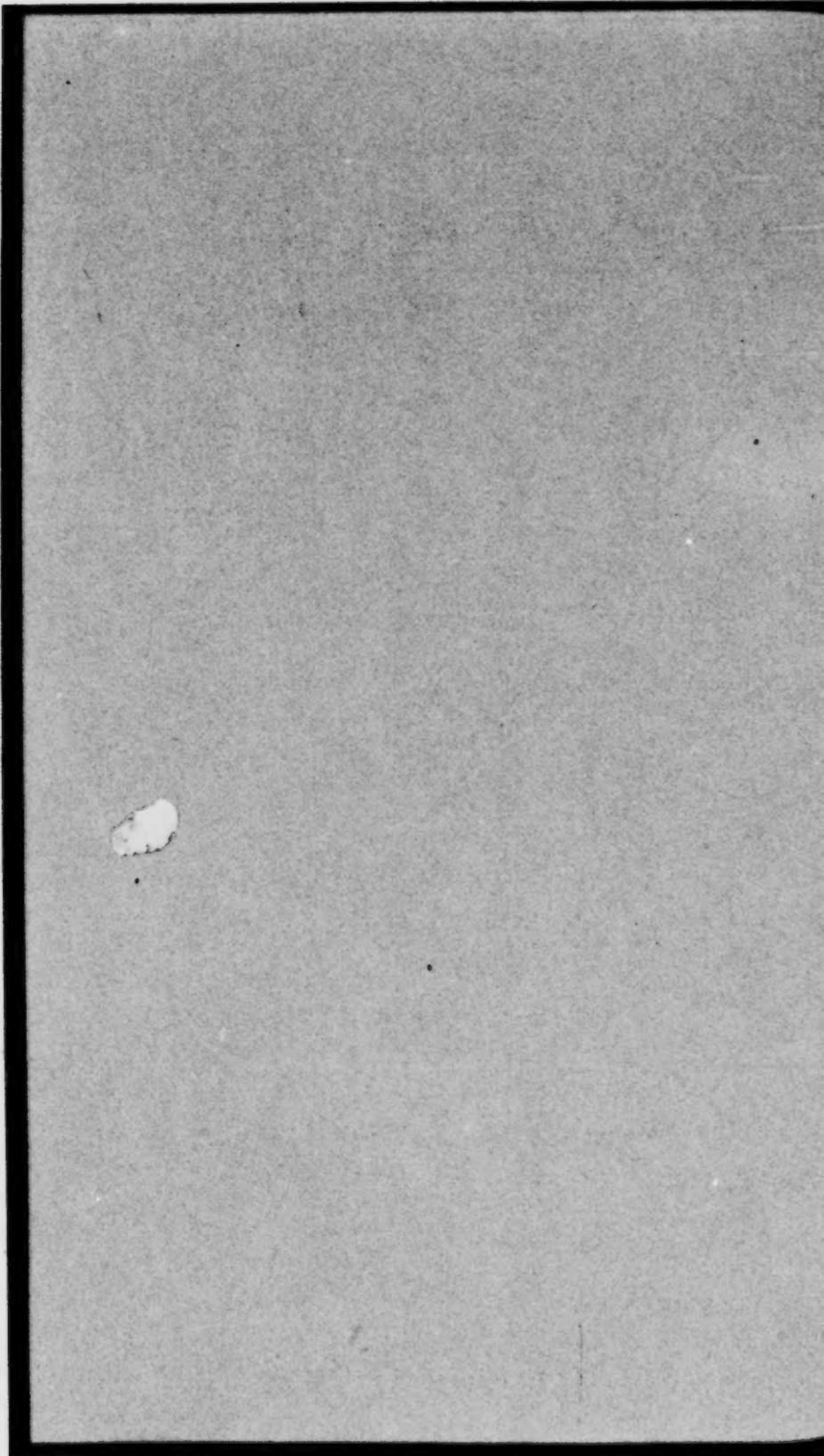
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ROME G. BROWN, and

Charles S. Albert, Attorneys for Plaintiffs in Error.

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No. 23<sup>rd</sup> 24.

IN THE

Supreme Court, State of Minnesota,

OCTOBER TERM, A. D. 1893.

*Nos. 8394 and 8395.*

THE MINNEAPOLIS MILL CO., PLAINTIFF, APPELLANT,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE  
CITY OF ST. PAUL, DEFENDANT, RESPONDENT.

THE ST. ANTHONY FALLS WATER POWER COM-  
PANY, PLAINTIFF, APPELLANT,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE  
CITY OF ST. PAUL, DEFENDANT, RESPONDENT.

[TWO CASES.]

**Assignments of Error and Points and Authorities  
of Appellants.**

BENTON, ROBERTS & BROWN,  
*Attorneys for Appellants.*

Filed November 10, 1893.

\* C. P. HOLCOMB, Clerk.

This brief contains on pages 38 and 39 the following:

\* \* \* \* \*

Before closing we raise the objection that the taking of waters in the manner shown in this case without allowing any sort of compensation to appellants (1) is a taking of private property without due process of law; (2) is a taking of private property for public uses without compensation; (3) impairs the obligation of contracts, and is in contravention, not only of our State constitution, but of the Constitution of the United States.

\* \* \* \* \*

STATE OF MINNESOTA:

SUPREME COURT.

OFFICE OF CLERK OF SUPREME COURT.

I, D. F. Reese, clerk of the supreme court of the State of Minnesota, do hereby certify and return to the Supreme Court of the United States that in the case of The St. Anthony Falls Water Power Company, plaintiff and appellant, against The Board of Water Commissioners of the City of St. Paul, defendant, respondent, and in the case of The Minneapolis Mill Company, plaintiff, appellant, against same defendant, respondent, which cases are numbered eighty-three hundred ninety-four and eighty-three hundred ninety-five, respectively, in the files of this court, decision in which was filed February 9, 1894, that before said cases were argued and on November 10, 1893, the appellants in both said cases filed in this court printed briefs, which were submitted to said supreme court on the argument of said cases, and that ever since the time of said filing, said brief, with the file-marks thereon, has been and still is on file in this

office as part of the files, records, and proceedings of this court in said cases, and that the brief hereto attached is a true and correct copy of the said original brief so filed and so still on file, and the file-marks endorsed on the copy so attached hereto are true and exact copies of the original file-marks and endorsements so on said original; and I do make this as a further return to the writs of error in said cases issued by the Supreme Court of the United States.

In witness whereof I have hereunto set my hand and the seal of the supreme court of the State of Minnesota, at St. Paul, Minnesota, this 15th day of October, A. D. 1897.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE,

*Clerk of Supreme Court, State of Minnesota,*

By J. L. HELM, *Deputy.*

[Endorsed:] Cases Nos. 15,683 and 15,684. Supreme Court U. S., October term, 1897. Term Nos. 23 and 24. The St. Anthony Falls Water Power Company, plff in error, vs. The Board of Water Commissioners of the City of St. Paul, and The Minneapolis Mill Co., plff in error, vs. The Board of Water Commissioners of the City of St. Paul. Certified copy of brief of plff in error in supreme court of Minnesota.

[Stamped:] Office Supreme Court U. S. Filed Oct. 18, 1897. James H. McKenney, clerk.



# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897.

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No. 15,683.

THE ST. ANTHONY FALLS WATER POWER  
COMPANY, PLAINTIFF IN ERROR,

v/s.

THE BOARD OF WATER COMMISSIONERS OF  
THE CITY OF ST. PAUL.

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No. 15,684.

THE MINNEAPOLIS MILL COMPANY,  
PLAINTIFF IN ERROR,

v/s.

THE BOARD OF WATER COMMISSIONERS OF  
THE CITY OF ST. PAUL.

---

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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BRIEF AND ARGUMENT  
FOR PLAINTIFFS IN ERROR.

## **STATEMENT OF CASE.**

These two cases are in this Court upon writs of error issued to the Supreme Court of the State of Minnesota to correct errors of the State Court in rendering final judgments of dismissal in the actions, which were brought in the District Court of the State and appealed to the State Supreme Court, which is the highest court in that state in which judgment in the actions could be rendered.

The general grounds upon which jurisdiction is claimed upon these writs of error for this court are: (1) That the judgment and decision of the State court is in favor of the validity of the act of the Legislature of the State of Minnesota, approved March 4, 1885, being Chapter 110 of the Special Laws of Minnesota for 1885 (see "8" Appendix hereto attached), which said statute, as construed by the State court, deprives plaintiffs in error of private property without due process of law; (2) that the same statute, as construed by the State court, impairs the obligation of the contract right belonging to plaintiffs in error and conferred upon them respectively by their charters, passed by the Territorial Legislature of Minnesota in 1856 (see charters of plaintiffs in error, "6" and "7" Appendix).

The pleadings and record show that both these federal questions were necessarily involved in the decision of the State court; and further that they were both passed upon adversely to the plaintiffs in error. The pleadings further show that the only questions decided, either by the lower court or the

Supreme Court, in rendering the final judgment against the plaintiffs in error, were questions directly involving these two federal questions.

While each of these cases was a separate case in the State courts, and each was brought here upon a separate writ of error, the dissimilarity in the issues of law and fact is so little, that they were considered together in the State courts; and they are to be considered and argued together in this court.

### **STATEMENT OF FACTS.**

There is no issue of fact for this court to pass upon. Issues of facts were made by the pleadings; but the judgment of dismissal is upon the facts shown by the plaintiffs themselves. There can be no material dispute between the parties in the statement of the facts as they are disclosed by the record. A statement, however, of the issues made by the pleadings and the facts as disclosed by the record, together with the decision of the State court, is necessary to show in what way the questions of law arise.

#### **The Pleadings.**

The complaint in each case alleges that the plaintiff was incorporated by the act of the Territorial Legislature, specifically referred to, and that the defendant was incorporated by the act of the State Legislature, specifically referred to; and alleges that in pursuance of the charter of plaintiff, it did acquire riparian lands upon the Mississippi River in the City of Minneapolis at the Falls of St. Anthony, setting out the ex-

tent of these lands; and that upon and opposite to its lands there is and always has been a natural fall in the river, making a natural water power; and that it did build extensive improvements in and upon its said lands and in the bed of said river, and did develop the said water power and make it available for use; and that it has made contracts with parties for the construction of mills and for the furnishing to them of the said water power, and that the power is a very valuable one; that all of said improvements and its ownership of said power and its said use of the same, were done and made in pursuance (1) of its rights acquired under said charter, (2) of its rights as riparian owner upon said river.

That the defendant has established a pumping station at the outlet of a great water-shed, which naturally drains into the Mississippi River above plaintiffs' power, and has pumped therefrom and threatens to pump therefrom ten million gallons of water a day, and threatens not only to continue to pump the same amount per day but to increase its pumping to the amount of thirty million gallons a day; that the water so pumped by defendant is diverted from above the water power of plaintiffs and carried around and past said water power and that no part of it is returned to said Mississippi River above the water power of plaintiffs but ten miles below; that the said diversion takes away from the plaintiffs' said water power a large quantity of water power, which plaintiffs need and would otherwise use; and that the actual damages already incurred by plaintiff are Three Thousand Dollars; that defendant purports to act under its said charter, and has made no compensation, nor brought any proceedings to fix compensation to plaintiffs.

And plaintiff asks for Three Thousand Dollars damages already caused by said diversion and asks for a perpetual injunction against any diversion.

More formal parts of the pleadings are not repeated here.

The answer of defendant in each case is substantially a denial of the allegations as to damages, etc.; alleges that by its charter it has a right to divert the water without making compensation; and (as provided by its charter, No. "8" Appendix) asks that if the plaintiff be adjudged entitled to an injunction or damages that the action be turned into a condemnation proceeding and that the amount of plaintiffs' permanent damages be determined, etc.

Before the trial, defendant withdrew this last part of its answer (see page 16 Transcript); so that the case was tried solely upon the question whether the defendant's charter gave it a right, without compensation, to make the diversion complained of as against the rights of plaintiffs (1) as riparian owner (2) under their charters.

**The Facts Shown by Plaintiffs' Evidence, as Appears  
from the Record.**

(Transcript, pages 16-51.)

The material facts all appear without any contradiction. The statement which follows is substantially the same as made in the State Supreme Court, which was assumed by both parties and by that Court to be a correct statement of the facts: (The citation of pages refer to the Transcript of Record in this Court.)

**1. The Situation of Plaintiffs in Error:**—The Falls of St. Anthony are situated in the Mississippi River in the City of Minneapolis. There is a natural fall in the river of over seventy feet in a distance of about one thousand feet (page 26). Just above the Falls is Nicollet Island, by which the river is divided into two channels. In the East channel the natural flow is one-third of the waters in the river, and in the West channel two-thirds (page 27). By reason of the rapids the river is not naturally navigable, either at these Falls or for one-half mile below and for some distance above (page 26). Its present navigability, either for the sluicing of logs, or for small craft, exists only by reason of the artificial facilities incidentally furnished by means of the dams of the plaintiffs (page 28).

The plaintiff in error, the St. Anthony Falls Water Power Company (hereinafter called the Power Company) and the

plaintiff in error, the Minneapolis Mill Company, (hereinafter called the Mill Company) are the owners of all the lands bordering on the river at these Falls, including all the shore lands and all the Islands in the river, the Power Company on the East side and the Mill Company on the West side. Both are corporations created under the charters of 1856, ("6" and "7" in Appendix to this brief). The Power Company owns in fee all of the lands on the East side of the river shown in Exhibit "H," including Hennepin Island and Spirit Island, which is marked in yellow upon Exhibit "H"; and also owns flowage rights above that point to the extent needed for its dams.

The Mill Company owns the lands upon the West side of the river, at the same point, shown on Exhibit "H" by yellow coloring, including Upton's Island; and also flowage rights above its riparian lands sufficient for its dam (pages 34-36). The plaintiffs on the respective sides of the river on which they are situated, have built dams and structures to utilize the water power at this point. These dams are constructed upon lands respectfully owned by them, and extend out into the river and meet near the center of the West channel. (See Exhibit "H" and pages 35-36).

By these dams the waters of the river are collected and made useful for water power, and fifty feet fall is now utilized (page 37). Without these dams the waters of the river could not be utilized to any great extent, as there would otherwise have been a rapid fall (page 27, also page 37). Plaintiffs have been in possession of this property and in the use of its dams so built and constructed for over thirty-five years, that is, since 1856 (page 26, also page 48).

The dams and improvements are maintained and operated by the plaintiffs; and the water power developed and

rendered available is furnished, at certain prices, by them to large mills situated near and on the river, the income going to keep up the improvements and for profits (page 37.) The water is all taken in for use on plaintiffs' own lands and is returned to the river through their own lands (pages 36-37).

The charter of plaintiff Power Company, after the usual provisions for incorporation, gives to the Company special authority and privileges as follows:

SECTION 9. The said corporators are hereby authorized, for the purpose of the improvement of the water power above and below the Falls of St. Anthony, in the Mississippi River, to maintain the present dams and sluices, and construct and maintain dams, canals, and water sluices, erect mills, buildings, or other structures for the purpose of manufacturing in any of its branches, or improving any water power owned or possessed by said Company, in such manner, or to such extent as shall be authorized by the Directors of said Company, and may construct dams on the rapids above or below the Falls of St. Anthony, with side dams, sluices and all other improvements in the Mississippi River, upon the property owned or to be owned by said corporators, which may be necessary for the full enjoyment of the powers herein granted; provided however, that said corporation shall give a free passage for all loose logs that are to be manufactured on Hennepin or Cataract Islands, or between them on the Falls, through any dam or dams they may erect, on the west side of Nicollet or Hennepin Island, and a passage through the pond above said dam, shall when needed be twenty feet wide; provided that nothing herein contained shall be so construed as to authorize said corporation to interfere with the rights or property of any other person or persons whatever. (See No. "6" Appendix to this brief.)

The charter of the Mill Company, provides, after the usual provision for incorporation:

SECTION 9. The said corporators are hereby authorized, for the purpose of the improvement of the water power above and below the Falls of St. Anthony in the Mississippi River, to maintain the present dams and sluices, and to construct dams,

and canals and water sluices, erect mills, buildings, or other structures for the purpose of manufacturing in any of its branches, or improving any water power owned or possessed by said Company in such manner to such extent as shall be authorized by the Directors of said Company, and may construct dams on the rapids above or below the Falls of St. Anthony, with side dams, sluices, and all other improvements in the Mississippi River, which may be necessary for the full employment of the powers herein granted. \* \* \*

**SECTION 11.** This act shall take effect and be in force from and after its passage, and may be amended by any subsequent Legislative Assembly, in any manner not destroying or impairing the vested rights of said corporators: provided, that nothing herein contained shall be so construed as to authorize said corporation to interfere with the rights or property of any other person or persons whatever.

**SECTION 12.** Provided further, that nothing contained in the act entitled an act to incorporate the St. Anthony Falls Water Power Company shall be so construed as to allow the said St. Anthony Falls Water Power Company, to maintain or construct dams or sluices extending beyond the center of the channel of the Mississippi River from the western bank of Hennepin Island, and said St. Anthony Falls Water Power Company are hereby restricted in the exercise of powers and privileges granted by the ninth section of said act to the space between the western bank of said Island and the center of said river; provided the said dams shall always be provided with suitable slides and sluices, so as to admit the passage of logs and timber down the Mississippi River, and that any future Legislature may amend, or modify this act or the act to which this section is amendatory, and provided further that the Minneapolis Mill Company shall be restricted in its operations to the center of the main channel of the Mississippi River and to the property belonging to said Company." (See No. "7" Appendix.)

**2. Situation and Acts of Defendant.** Defendant is a corporation under Chapter 110, of Special Laws of 1885, which act provides for the organization and incorporation of the defendant and provides: (See No. "8" Appendix.)

**SECTION 6.** That the said board of water commissioners may from time to time, for the purpose of furnishing a full

supply of water to the inhabitants of the City of St. Paul, extend said waterworks or make new lines of works, and as it shall from time to time so extend its said works or make new lines of works, it may draw water from any lake or creek by means of pipes, ditches, drains, conduits, aqueducts, or other means of conducting water so as to connect said lakes or creeks with its said works, and may erect and construct dams, bulk-heads, gates and other needed structures and means for controlling of water and its protection, and in general to do any other act necessary or convenient for accomplishing the purposes contemplated by this act.

SECTION 7. Whenever at any time said board shall propose to extend its said works so as to connect with any of said lakes or creeks, or to divert the waters of any stream, creek or body of water, it shall proceed as follows: (here follow provision for condemnation proceedings.)

SECTION 11. The owner or owners of any such land or lands, may maintain a suit for the recovery of the possession of lands used by the board of water commissioners, for the value thereof, and the damage thereto by reason of the taking thereof as aforesaid, either by flowage, drainage or otherwise, or damage of any kind.

SECTION 36. \* \* \* \* The term "real estate" as used in this act, shall be construed to signify and embrace all uplands, lands under water, the waters of any lake, pond or stream, all and every estate, interest and right, legal and equitable, in lands or waters, including term for years, and liens thereon by way of judgment, mortgage or otherwise, and also all claims for damage to such real estate.

Purporting to act under this charter, the defendant in 1890, established a pumping station on Lake Baldwin, which is a fresh water lake with an area of about a mile square (page 28). This lake is situated in Anoka county, about eight miles above plaintiffs' water power (page 23). It is the outlet of an immense water shed of an area of one hundred and thirty square miles (page 25); in this water shed are several lakes with a water surface of twenty-five square miles (page 27; see Exhibit "G"). It is ten miles or more north

of St. Paul and in an entirely different water shed from that of St. Paul (page 24). This water shed, including Baldwin Lake, is drained by a natural stream, Rice Creek, which is the only outlet to that lake or that water shed (page 22), and which naturally flows out of Lake Baldwin and thence into the Mississippi river, above the water power of plaintiffs. Defendant owns a small tract of land on the shore of Lake Baldwin, upon which it has built a pumping plant with a capacity of ten million gallons a day or more. For three years it has been pumping water from Lake Baldwin out of the Rice Creek water shed into the St. Paul water shed, thereby diverting all of the waters pumped from its natural course past the water course of plaintiffs to a point fifteen miles below plaintiffs' water power (page 24, also Exhibit "G"). The pumping works established are permanent, and the pumping has extended down to and after the time when this suit was brought, and still continues (page 50). The water so pumped is carried to the City of St. Paul, not only for domestic uses of its inhabitants, but for sprinkling streets, filling their lakes, furnishing water for steam boilers for manufacturing establishments, running water motors (page 49-50); it is furnished to consumers to use for any purpose that they please (page 51), at a price charged and collected by defendant (page 50).

**3. The Damage to Plaintiffs.** The amount of water so diverted by defendant for three years prior to this suit has varied from three million gallons a day to ten million gallons a day (pages 17-18), and amounting in the year 1890, to 1,491,926,000 gallons; in 1891, to 1,983,034,500 gallons; in 1892, to 1,445,604,400 gallons (pages 17-18 and page 50); and in January, 1893, to 91,000,000 gallons (page 50). This action was brought in December 30, 1892.

Making allowance for evaporation and for all causes, the water power of plaintiffs has been deprived by this pumping of ninety-five per cent of the amount pumped (page 25). While this diversion does not decrease, to any great extent, the perceptible depth of the Mississippi River, at plaintiffs' power plants, it very materially diminishes the water power which plaintiffs would otherwise have had (page 32). During some months of the year there is more water at St. Anthony Falls than plaintiffs can utilize, and during these months the diversion of the amount of power by defendant would occasion less money damage to the plaintiffs than at other times. During the months when the water is not flowing over the dam the diversion by defendant causes a direct pecuniary injury and damage to plaintiffs to the full extent of the value of the amount of water power by which the amount of plaintiffs' water power is diminished (page 38). During these months when the water was not running over the dam, plaintiffs had a demand at market rates for more water power than they were able to supply (pages 39, 40 and 41). The loss to plaintiffs is \$20.00 a horse power per year; and reducing that figure to gallons, the loss to plaintiffs for every million gallons of water pumped away from their water power has been eighty cents (pages 27 and 38). During the months when the water was not running over plaintiffs' dam, in 1890, plaintiffs' water power was deprived, by diversion of defendant, of 1,044,300,000 gallons (page 32) and during the same period, in 1891, of 1,561,000,000 gallons (page 62). Corresponding results are shown for 1892 (page 32). On account of this diminution of power so caused by defendant, plaintiffs have not been able to supply the demands made upon them by their customers. In the case of the Power Company, deficiency has been made up to customers by supplying them

more water when the Power Company had more to supply (page 32), and in the case of the Mill Company, cash rebates, in the shape of deductions of rentals, have been made to its customers (page 39). When water is short, the more recent lessees are shut off first, on account of the priority rights of others (page 42), and thus the loss comes first on the highest priced customers, as the later leases are at the highest prices (page 42). Besides loss by rebates to regular customers, it has lost by inability to supply excess power at current market rates (page 46).

#### **THE DECISION OF THE STATE COURT.**

In the trial court, after plaintiffs' evidence had been offered, the plaintiffs rested, and the trial court ordered a dismissal of the actions. Plaintiffs moved for a new trial, which motion was denied. From that denial they appealed to the Supreme Court of the State, where the order denying plaintiffs' motion for a new trial was affirmed, and the case remanded to the trial court. In the trial court then judgment of dismissal was entered. From that judgment plaintiffs appealed to the Supreme Court of the State, where final judgment was entered in each of said cases affirming the judgment of dismissal; which said judgments of affirmance were ordered and made, for the reasons expressed in the opinion of the Court filed on the appeal from the order denying a new trial (pages 86-88).

The opinion and reasons upon which the judgment was rendered by the State Court are found on pages 76-79 of the record, and are reported in Volume 56 Minnesota Reports, page 485. (See No. "9" Appendix hereto).

The decision is a broad and sweeping one and is based solely upon the ground, first, that the defendant's charter gave it a right to divert the waters and do all the acts complained of by the plaintiffs; and that that charter did not intend to provide for compensation to plaintiffs for the damage occasioned by defendant's diversion; and that the authority given by that charter to the defendant to make the diversion without compensation for damage to plaintiffs' water power, was valid, because the property rights which plaintiffs claimed to have as riparian owners to the use of the water naturally flowing past their lands, were subject to the right of the State to authorize the diversion without compensation; second, that there was nothing in plaintiffs charters which made invalid the authority obtained by defendant under its charter to make the diversion without compensation—that is, that the effect of the authority of defendant's charter was neither (1) to take away the vested property rights obtained by plaintiffs by virtue of their charters, nor (2) to impair the obligation of any contract right belonging to plaintiffs under their charters.

All the questions urged now in this court were urged in the courts below, and besides them other federal questions, which plaintiffs do not at the present time urge.

We confine ourselves to the following propositions of law, which were not only urged in the State Court and passed upon adversely to plaintiffs, but which were also necessarily involved in the decision of the State Court:

1. Plaintiffs have a property right (1) as riparian owners and (2) by virtue of their charters, to the natural flow of the waters of the Mississippi River past their lands, which right is not subject to be diminished by diversion under authority of the State for the general public use of a municipality not in

any wise connected with the preservation and development of the river as a highway, without just compensation; that such a diversion is contrary to the Constitution of the State of Minnesota and the law of property rights governing this property of the plaintiffs, not only under the rules of property existing at the time plaintiffs made these improvements, but also under the rules of law governing plaintiffs' property, as they existed in Minnesota and elsewhere, up to the time of the decision complained of; and that therefore the effect of the statute giving defendant its authority is to take private property of plaintiffs without due process of law, and is therefore repugnant to the provisions of the 14th Amendment to the Constitution of the United States. And further, as corollary to the foregoing, that many of the purposes for which the diversion by defendant is authorized and is made, are not "public" uses, but private uses; and that for that reason, the effect of the charter of defendant is to take private property for private uses without compensation, and is therefore repugnant to the United States Constitution.

2. That the charters of the plaintiffs passed in 1856 gave and guaranteed to plaintiffs the right to use and develop the water power at St. Anthony Falls, the Power Company on the East side and the Mill Company on the West side, and authorized them to build such structures in and upon the river as were necessary to develop that power; and that when those provisions of their charters were accepted and acted upon, they became contract obligations between the State of Minnesota and the plaintiffs; and that the statute authorizing the defendant to take away or diminish in value, by a diversion of the water, the privileges and uses insured to plaintiffs, is invalid and repugnant to Section 10 of Article 1, of the Constitution of the

United States, on the ground that it impairs the obligation of contracts and vested rights granted to the plaintiffs by their charters.

#### **ASSIGNMENTS AND SPECIFICATIONS OF ERROR.**

The said plaintiff in error comes and says that in the record and proceedings in this suit in said Supreme Court of the State of Minnesota, there is manifest error in this:

That the said court held the statute of Minnesota entitled, "An act to amend and consolidate an act to authorize the city of St. Paul to purchase the franchises and property of the St. Paul Water Company, and creating a board of water commissioners, approved February 10, 1881, and the act amendatory thereof, approved the 25th day of January, A. D. 1883", approved March 4, 1885, being Chapter 110 of the Special Laws of Minnesota for the year 1885, in so far as it authorized the diversion of water by said defendant in error from the Mississippi River above the water power of plaintiff in error, without compensation to plaintiff in error, to be valid and not in conflict with the provisions of the Constitution of the United States, whereas the said act was invalid and contrary to the provisions of the Constitution of the United States on each of the following grounds: (1) That in so authorizing said diversion the said act of 1885 is contrary to Section 1 of Amendment XIV of the Constitution of the United States, in that it deprives said plaintiff in error of its property without due process of law. (2) That the said act is contrary to the provisions of Section 1 of said Amendment XIV, in that it abridges the privileges and immunities of the plaintiff in error, a citizen of the United States. (3) That the said act is

contrary to the provisions of Section 1 of said Amendment XIV, in that it denies to the plaintiff in error the equal protection of the laws. (4) That said act is contrary to the provisions of Section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of the contract rights of plaintiff in error which are vested in plaintiff in error by virtue of its charter.

For further specification of the errors to be relied upon, under the said assignments, we present the following:

1. There was error in this, to-wit: Plaintiff in error has a property right as riparian owner to the use of all the water naturally flowing past its land, which said right is not subject or subordinate to the uses of the defendant, nor subject to the taking thereof by the authority of the State without compensation; but by and under said judgment the said State Supreme Court held that the said rights of plaintiff in error were subordinate to the uses of defendant and subject to the taking thereof by authority of the State without compensation, and decided in favor of the validity of the authority of said State and the said statute, as interpreted and enforced by the said Supreme Court in its said judgment, authorizing such taking for a public use without making compensation; whereby the said authority of the said State and the said statute of 1885, as construed by said State court, has the effect of taking the private property of plaintiff in error for a public use without compensation, and is thereby repugnant to the 14th amendment of the Federal Constitution prohibiting any State from depriving a person of any property without due process of law.

2. There was error in this, to-wit: Said plaintiff in error has a property right by virtue of its charter to the use of all the

water naturally flowing past its land, not subordinate to the use by defendant nor subject to be taken away by authority of the State without compensation; but the said State Supreme Court held that such property rights of plaintiff in error were subject to such taking, and sustained the validity of the authority and the said statute of 1885 of the State of Minnesota authorizing such taking for a public use without compensation, and by and under said judgment of said State Supreme Court, the said property of said plaintiff in error is thus, under and by virtue of the said act of 1885 of said State, as interpreted and enforced by said Supreme Court of said State in its said judgment, taken for a public use without compensation, and said plaintiff in error is thus and thereby deprived of its property without due process of law, and contrary to the provisions of the 14th Amendment to the Federal Constitution.

3. There was error in this, to-wit: The said State Supreme Court erred in holding that none of the uses made by defendant were "private uses", whereas the record and proceedings show that many of said uses were not public uses but were private uses; and by sustaining the validity of the said statute of 1885 authorizing the said taking without compensation, by and under said judgment of said Supreme Court of said State of Minnesota the private property of said plaintiff in error is, under and by virtue of the authority of said State, and by the said act of 1885, as interpreted and enforced by the said Supreme Court of the State of Minnesota in its said judgment, taken for a private purpose, and said plaintiff in error is thus and thereby deprived of its property without due process of law and contrary to the provisions of the 14th Amendment to the Constitution of the United States.

4. There was also error in this, to-wit: By virtue of the charter of plaintiff in error, plaintiff in error became vested with a contract right from the State of Minnesota to the use of the undiminished flow of the Mississippi River over its said dams for the use of power, which said rights were not subordinate to the use of defendant nor subject to be taken by authority of the State without compensation; but by the said act of 1885, the said contract obligations and rights were taken away and impaired for the benefit of defendant in error without compensation; and by the said judgment of the said State Supreme Court of Minnesota the said act of 1885 was held to be valid and not to impair the obligation of the said contract rights of plaintiff in error under its charter, whereas the said act of 1885, as construed by said court has thereby the effect of impairing the obligation of said contract rights, contrary to the provisions of Section 10 of Article I, of the Constitution of the United States.

Wherefore said plaintiff in error prays that the said judgment of the said Supreme Court of the State of Minnesota be reversed and annulled and that said plaintiff in error be restored to all things lost by reason of said judgment and that judgment be rendered in its favor and against said defendant in error.

It has been agreed that these cases should be heard here and argued together, and we here make, for the purpose of this argument, assignments and specifications of error together for both of the cases under consideration. We do not urge in our argument all of the errors set forth in the original assignments, but only those which go to the invalidity of the statute and authority of the State of Minnesota, attempted to be exercised under the Act of 1885, above specified, on the ground that they are repugnant to the following provisions of

of the Federal Constitution: (1) Section 1 of Amendment XIV, prohibiting any State from depriving a person of his property without due process of law, or denying to any person within its jurisdiction the equal protection of the law; (2) Provisions of Section 10 of Article I prohibiting any State from passing any law impairing the obligation of contracts.

## ARGUMENT.

### I.

#### THE QUESTION OF JURISDICTION.

Anticipating the usual objections to the jurisdiction of this court, we will at the outset briefly state the general grounds upon which we claim jurisdiction. The grounds for our claim are such that a discussion of the question of jurisdiction is in itself, to a great extent, a discussion of the merits. Accordingly, if any question as to the jurisdiction is raised, we refer further to the argument and authorities cited under the other part of this brief.

We claim jurisdiction of this court under Section 25 of the Judiciary Act, as amended, providing that "a final judgment or decree in any suit in the highest court of the State, in which a decision in a suit could be had \* \* \* where is drawn in question the validity of the statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity \* \* \* may be re-examined and reversed, or affirmed in the Supreme Court upon a writ of error."

The judgment here in question is the final judgment and decree in these suits in the highest court of the State of Minnesota in which a decision in a suit could be had.

The charter of defendant is a statute of the State of Minnesota, which, as construed by the Minnesota Court in these cases, authorized defendant to take plaintiffs' property without compensation.

The validity of that authority and statute is attacked in this suit by plaintiffs, on the ground that it is repugnant to the Federal Constitution; and the decision in question is in favor of that authority and statute.

The questions raised and objections interposed by plaintiffs, were interposed in the court below. They were directly passed upon by the State Court. More than that the federal questions urged here were necessarily involved in the decision of the State Court.

The record shows, that the effect of the statute, as construed by the State court, is to take away from plaintiffs without compensation their private property, which is vested in them by the laws and decisions, not only of the State of Minnesota, but also by law of property which could not be changed by either the Legislature or Courts of Minnesota; that this taking is not only authorized and done for public a use, but for a private use.

The Constitution of the State of Minnesota, and the laws and decisions of that State have always required and still require that when private property is taken for a public use, just compensation shall be first paid or secured therefor, and that private property cannot be taken for a private use against the will of the owner.

The statute, then, giving authority to defendant, is repugnant to the Constitution of the United States, and particularly to Section 1 of Article 14 of the amendment thereof, in that it deprives plaintiff of their property without due process of law.

Without further citing authorities of jurisdiction on this point, we will cite for the present one case in which jurisdiction under similar circumstances and for similar reasons has been sustained.

*Kaukuna Co. vs Green Bay Co., 142 U. S. 254.*

Again plaintiffs claim that by the terms of their charters passed in 1856, there was granted and insured to them a vested property right in all the power developed at their dams which could be created by the natural flow of the Mississippi River at that point; and that that was in the nature of a contract obligation and right.

These rights are now diminished and injured by virtue of the authority in the statute charter of defendant passed in 1885. That statute then has the effect of impairing the obligation of the contract rights granted in the charters of the plaintiffs.

This is prohibited not only by the Constitution of the State of Minnesota, but is also contrary to the Tenth section of Article I, of the Constitution of the United States, in that it is a statute which impairs the obligation of contracts.

It is no answer to the claims for jurisdiction to say that the State Court has construed and determined the rights which plaintiffs got under their charters, and construed these charters in such a way that the later charter of defendant does not impair contract rights under them. These are questions which must be determined and examined by this court.

*Bridge Proprietors vs Hoboken Co., 1 Wall. 116.*

*Piqua State Bank of Iowa vs Knopp, 16 How. 369.*

Referring, then, to the following argument for further reasons and authorities sustaining the jurisdiction of this Court in this matter, we proceed to discuss the questions involved upon their merits.

## II.

**THE STATUTE OF MINNESOTA OF 1885, AS CONSTRUED  
AND SUSTAINED BY THE STATE COURT, DEPRIVES  
PLAINTIFFS IN ERROR OF THEIR PRIVATE PRO-  
PERTY WITHOUT DUE PROCESS OF LAW.**

In order to sustain this proposition, it is necessary only for us to show that the plaintiffs in error have a property right to the use, for power, of all the water naturally flowing in the Mississippi River past their lands, and over their dams; and that this property right was one which was not subject to the right of the State to authorize, without compensation, a diversion of those waters away from the dams and lands of plaintiffs for the uses made of it by defendant.

Without repeating here all the facts necessary to be kept in mind with reference to the situation of plaintiffs and defendant, we wish at the outset to call attention particularly to the undisputed facts shown by the record, that, although the Mississippi River is, generally speaking, a public navigable river, still at the point in question it is not navigable in fact in any sense of the term, but is only navigable for logs and small craft, at, above and below the point in question, by reason of the artificial structures maintained in the river by the plaintiffs. Further, the plaintiffs have been the owners and in possession of the riparian lands in question and all the dams and improvements in question ever since the year 1856; and they have been

and are the owners in fee of all these lands, including all the Islands at and below the Falls at this point. The use to which the diverted waters are put is a use in no wise connected with the navigation of the river, or the improvement of the river in any way. It is a use, which is, in its nature, antagonistic to the preservation of the river as a public highway and is directly contrary to any purpose or intention to use the river for navigation. Under our first proposition, we propose to show:

1.

**Whatever rights may be left to the State, in its sovereign capacity or otherwise, to control the bed or waters of a navigable, running stream, and for that purpose to damage riparian owners in their use of the waters of the stream for power, those rights of the State do not extend to the right to authorize a diversion of those waters for purposes not in any way connected with, but in conflict with, the preservation and improvement of the river for the purposes of a public highway, to the damage of riparian owners using the waters for power, unless just compensation is made.** As against such diversion, the rights of riparian owners to the use of the water for power, are not such as are within the control of the State, either by its legislature or its courts; they are not rights retained by the State, which the State has to "release" to the riparian owner, nor which the State can restrict. They are well established property rights, by the law of property as established by the fundamental law and decisions of the land. Independent, then, of the property rules recognized by the courts of Minnesota, these rights are to be determined by an examination of the general rules applicable to riparian owners upon

**such streams, as shown by the decisions existing at the time when the plaintiffs first became the owners and possessors of these lands and dams, and the general law applicable to their situation since. These rules of law, as shown by the decisions of English and American courts, guarantee to plaintiffs a property right to the use of all the waters naturally flowing past their lands, which is not subject to the right of the State to authorize such a diversion as is made by defendant.**

Under this proposition we do not discuss particularly the Minnesota decisions on the subject; for the reason, as stated, that, on account of the peculiar character of the diversion, the property rights of plaintiffs are to be determined by the general law of property rights applicable to riparian owners in their situation.

On account of the distinctions which we here make, it is necessary to recall certain elementary principles applicable to the rights of riparian owners in general, although they have become maxims, and although they are not disputed by the decisions of the Minnesota State court here in question.

Every proprietor on the banks of a running stream has naturally, a property right, as an incident to the land, to the use of all the water naturally flowing past his land without diminution or alteration. This right is a right of property, and as such property it is a part and parcel of the riparian land itself.

*3 Kent's Commentaries, 441.*

*Acquackanonk Water Company vs Watson, 20 N. J. Eq., 369.*

*Lyon vs Fishmonger's Company*, 1 L. R. App. 662.  
*Cooley Constitutional Limitations*, P. 691.

The property right is a right to the use of the water, and all the water naturally flowing in the stream. The water itself cannot become the subject of appropriation or exclusive dominion, either by an individual or by a sovereign. Neither sovereign nor subject can acquire anything more than a mere usufructuary right therein.

2 *Blackstone Commentaries*, 18.

*Sweet vs City of Syracuse*, 129 N. Y. 316, and cases cited.

The general law thus stated is applicable, as well to public navigable streams and water, both fresh water streams and streams where the tide ebbs and flows, as to private streams.

*Lyon vs Fishmonger's Company*, 1 L. R. App. 662.

*North Shore Railroad Co. vs Pion*, 14 L. R. App. cases, 612, and other cases cited below.

This usufructuary property right is always subject, both on private and public streams, to the reasonable use by a riparian owner above for his own private purposes; but it is not subject to the consumption by an upper riparian occupant for other than for the domestic uses of his family. A municipal corporation, by acquiring a piece of land upon a lake or river, does not thereby acquire the right to pump the water away from the river for the use of the inhabitants of the municipality, as against the rights of user belonging to the riparian proprietor below.

*Emporia vs Sowden*, 25 Kan. 417.

*Water Company vs Watson*, 29 N. J. Eq. 369.

*Stein vs Burden*, 24 Ala. 130.

*Witt & Berks' Canal Nav. Co. vs Swindon Water Works Co.*, L. R. IX Ch. App. cases (1874) 451.

*Reading vs Althouse*, 93 Pa. St. 400.

*Hall vs Ionia*, 38 Mich. 498.  
*Hough vs Doylestown*, 4 Brews. 333.  
*Mills Eminent Domain*, Sec. 79.  
*3 Kent Com.* 439.  
*Gould on Waters*, Sec. 205, 208, 245.  
*Gilzinger vs Saugerties Water Power Co.*, 66 Hun. 173.  
*Mannville Co. vs Worcester*, 138 Mass. 89.  
*Higgins vs Flemington Water Co.*, 36 N. J. Eq. 538.  
*Rigney vs Tacoma Light and Water Co.*, (Wash.) 38 Pac. Rep. 147.  
*Saunders vs Bluefield, W. W. and Imp. Co.*, 58 Fed. Rep. 133, 136.  
*Gardner vs Newburgh*, 2 John Ch. 162.  
*Arnold vs Foote*, 12 Wend. 330.  
*Etna Mills vs Brookline*, 127 Mass. 69.  
*Bailey vs Woburn*, 126 Mass. 416.  
*Willis vs City of Perry*, (Ia.) 60 N. W. Rep. 727.

The four propositions last above stated, and the authorities upon which they are based, which we have cited, were assumed by the Supreme Court of Minnesota, in their decision in these cases, to be as we have above stated them.

The distinction attempted by the Supreme Court of Minnesota in these cases is based, not upon any decision of the State of Minnesota, but upon the general law applicable to public streams; and as to public streams the distinction is claimed, by virtue of the general principles governing those streams, that the rights of plaintiffs to the use of the undiminished flow of the Mississippi past their lands is subject to the right of the State to divert for the uses of defendant without compensation.

An examination of the origin and character of the distinction which exists in this country between the rights of riparian owners upon public streams, and those upon private streams,

is therefore necessary to determine whether plaintiffs' rights were absolute as against the diversion authorized, or were subject to it.

Under the common law waters were divided into two classes, "public" and "private", or "navigable" and "unnavigable", the distinction being based upon the fact of whether or not they were at any time affected by the tide. In those thus classed unnavigable, the riparian owner took to the centre of the stream, owning the land under the water and controlling the water itself, to the exclusion of all uses by others, even for the purpose of navigation; while in those classed navigable, the riparian owner took to the shore, with qualified rights below, and the sovereign retained in the bed and in the waters themselves, both a private property right and a right of control for public use,—*a jus privatum* and *a jus publicum*.

*Hale de Juris Maris, Ch. 6 and cases below cited.*

This common law distinction and rule of property were in early times attempted to be applied to the great fresh water lakes and streams of this country; but by a wise provision, early adopted by this Court and most of the other Courts of the United States, the common law rule of property was modified. The change arose solely upon the ground, that the common law rule if adhered to would operate to keep the sovereign power from a proper protection of the great natural highways of commerce; and for the purpose that the great fresh water lakes and streams of this country might not come under the absolute control of private owners, and in order that they might be forever kept open for the general public use, for which nature intended them, of public highways, a different rule was adopted; and the classification became one based upon

the actual navigability of the lake or stream. In streams actually navigable, there was retained in the sovereign as original owner and grantor a certain specified interest in the bed and waters of the streams. This interest was in no sense a proprietary one; as the idea of any proprietary interest in the sovereign, either in the bed or in the waters of public streams in this country, has been repeatedly denied by the decisions of this Court and of the different States, and has been repudiated by the Supreme Court of Minnesota.

*Gould on Waters*, 246.

*Angell Water Courses*, Sec. 542.

*The Genesee Chief*, 12 How. 443.

*Century Dictionary word "Navigable"*.

*Lamprey vs State*, 52 Minn. 181.

*Barney vs Keokuk*, 94 U. S. 324.

*Green Bay Canal Co. vs Kaukauna H. P. Co. (Wis.)* 61

*N. W. Rep.* 1121.

*Bradshaw vs Mill Co.* 52 Minn. 59.

*Att'y Gen'l vs Del & B. B. Ry. Co.* 12 C. E. Green (N.J.)

1, same case 12 C. E. Green, 631.

The right reserved to the State is defined as one from which every element of a proprietary interest is absent; it is purely a holding in trust by a sovereign power, not one of appropriation or ownership, nor for any object involving diversion; but one of control simply for certain uses and purposes, from which the very nature of the State's interest excludes the idea of diversion.

*Ill. Cent. R. R. Co. vs Illinois*, 146 U. S. 387, 453.

*Union Depot Co. vs Brunswick*, 31 Minn. 297.

*Hanford vs Ry. Co.* 43 Minn. 104, 112.

*Smith vs Rochester*, 92 N. Y. 463.

*Sweet vs Syracuse*, 129 N. Y. 316.

*Saunders vs. R. R. Co.*, 144 N. Y. 75.

*Coxe vs State*, 39 N. E. Rep. (N. Y.) 400.

*Green Bay Canal Co. vs Kaukauna W. P. Co.* (Wis.) 61 N. W. Rep. 1121.

These uses and purposes which limit the character and extent of the control of the State over large, fresh waters and their beds are the very ones which first gave rise to the distinction adopted in this country. They are those of keeping the stream open and subject to improvement for a public highway, that is, for the purpose of navigation.

*Hanford vs Ry. Co.* 43 Minn. 112.

*Green Bay Canal Co. vs Kaukauna W. P. Co.* 61 N. W. Rep. (Wis.) 1121.

*Kaukauna W. P. Co. vs Green Bay Canal Co.* 142 U. S. 254.

Wherever other and incidental purposes, such as fishing, bathing, etc., have been recognized as part of the public uses for which the State retains control, they have been those which would not involve any diminution or diversion of the water itself. Any such diminution or diversion would strike at the very basis upon which this sovereign right or trust has been established; for any diversion, however small, is a step towards destruction, and the very idea of destruction or diversion, when referred to streams and lakes, is incompatible with the very basis and reason upon which the State's interest in these fresh waters has arisen,—the preservation and protection of streams and lakes for the use of commerce and for public highways. This inconsistency is not merely theoretical, for experience has shown that in times of low water the pumping of water for such uses from a navigable stream may destroy navigation or injure it to a very large extent.

*Philadelphia vs Collins*, 68 Pa. St. 106.

*Same vs Gilmartin*, 71 Pa. St. 140.

In accordance with this distinction and the purposes for which it has been established, the sovereign right of control in the bed and waters of navigable fresh water streams and lakes in this country is one with certain definite limitations. IT IS AND MUST BE LIMITED TO THE CONTROL ONLY FOR THOSE PUBLIC USES WHICH ARE CONNECTED WITH AND CONSISTENT WITH THE PRESERVATION AND MAINTENANCE OF THE RIVER, OR WITH ITS IMPROVEMENT FOR THE PURPOSES OF ITS USE AS A PUBLIC HIGHWAY. To refuse to recognize such limitations, is to yield up to the State an arbitrary control, in the exercise of which the very purpose for which the sovereign has been allowed to retain any interest at all, either in the beds or the waters, may be and undoubtedly would be thwarted. Among the limitations which must be thus placed upon the sovereign's right of control, is that it has not, as such sovereign, an absolute and unqualified right, itself to make, or to authorize others to make, a diversion of the waters of the river for a use, whether it be public or private, which is neither directly nor indirectly connected with or consistent with the purposes of navigation. If the City of St. Paul, or the defendant as its Board of Water Commissioners, can be authorized by the State, by virtue of its sovereign right over the control of the bed and waters of the Mississippi, to make a diversion of ten million gallons of water a day, and carry it around a distance of twelve or fifteen miles away from the natural channel of the Mississippi River, for the purpose of supplying its inhabitants with water, and filling lakes for the purpose of enhancing the landscape and other similar purposes, it can be given the right also to dam the Mississippi or any other "public" stream or lake, and to divert the entire waters of such stream or lake into the St. Paul water shed, or any other water

shed, and away from its natural channel; it can get the right to do this,—if these decisions of the State court are right,—to the entire destruction of the stream for the purposes of navigation, and to the entire deprivation of riparian owners below for any use of the waters for power; and it can get the right thereby to make valueless the immense property interests of the plaintiffs and the industries which for nearly half a century have been and still are dependent upon the water power which nature provided for developing the industries of the country, and upon the faith of which plaintiffs and other business corporations and individuals have invested millions of capital,—all without compensation.

The State cannot possibly be said to have any such paramount right. Its rights as sovereign are limited. The limitation excludes the right claimed by the State in these cases. Where the limitation of the sovereign right of the State ends, there the property right of the riparian owner begins. Attached to his riparian lands he has all rights in the stream, the exercise of which would not conflict with its use or control for the purposes of commerce; and these rights are none the less property rights because his absolute fee in the bed of the stream may have been limited.

*Schurmier vs Ry. Co.* 10 Minn. 82. (*Gil.* 59.)

*Ry. Co. vs Schurmier*, 7 Wall. 272.

*Yates vs Milwaukee*, 10 Wall. 497.

*Pompeley vs Green Bay Co.*, 13 Wall., 166.

*Foster vs Bank*, 57 Vt. 128.

*Eaton vs B. C. & M. R. R. Co.*, 51 N. H. 504.

*Ten Eyck vs Del. Raritan Canal Co.*, 18 N. J. L. 200.

*Canal Co. vs Jersey City*, 26 N. J. Eq. 294.

*Lyon vs Fishmongers Co.*, 1 L. R. App. 662.

*No. Shore Ry. Co., vs Pion*, 14 L. R. App. Cases 612.

*Morrill vs St. A. F. W. P. Co.*, 26 Minn. 222.

*Wait vs May*, 48 Minn. 453.

*Hanford vs Ry. Co.*, 43 Minn. 104.

*Myers vs St. Louis*, 8 Mo. App. 266.

*Cooley Const. Limitations*, p. 691.

It may be true that, in accordance with the doctrine laid down by this court in the case of *Hardin vs Jordan*, 140 U. S. 371, and *Packer vs Bird*, 137 U. S. 661, the State, by its legislature or its courts, may have a right to "release" to the riparian owner, and add to the riparian owner's absolute right of property, certain interests in the bed of the river below high water mark, and also add to the uses of the water in the river itself, certain interests which would not, except by favor of the State, belong to the riparian owner. But the State cannot release to the riparian owner, or control or restrict the riparian owner, in the use of any of those rights or interests, which did not belong to the State as sovereign or otherwise. This point is next discussed as a separate proposition; but is mentioned here as important at the present point of the discussion.

Beyond the riparian owner's absolute ownership, which he would have without the sanction of the State, certain concessions or as they are termed in the Hardin and Packer cases, "releases," have been granted or allowed to the riparian owner in the nature of an absolute control of the land below high water mark, and of the waters of the river as against what would otherwise have been the absolute control of the State for the purpose of navigation; and it is for that reason that in different states the line of absolute ownership and control in the bed and waters below ordinary high water mark varies, some leaving it only at the high water mark, some extending it to low water mark, and some extending it to the

entire bed of the stream. But in spite of this difference in the extent of the limitation placed upon his fee, the riparian owners' rights to the use of the waters, as against a diversion by the State for purposes other than for navigation, remain the same in all jurisdictions. All limitations, in so far as they are left in force upon what would otherwise have been the absolute property of the riparian owner in case the stream had been private and unnavigable, are limitations placed and reserved for the one purpose of preserving to the State control of the stream for the purposes of navigation; and the sovereign power of control for those purposes remains the same in all and subject in every case to the limitations which we have defined. As was recently said by the New York Court of Appeals, though the State may acquire a mere usufructuary right to the use of the water for any purpose, it could not acquire either as owner or sovereign the ownership of the aggregated drops that comprise the mass of flowing water in a lake or its outlet, and whatever the status of title in the bed, whether it be held to be in the riparian owner or in the state itself, the *diversion* of the water is an infringement of the property rights of lower proprietors to the use of the water.

*Sweet vs. Syracuse*, 129 N. Y. 316.

*North Shore Ry. Co. vs. Pion*, 14 L. R. App. Cases 612.

Subject only to the State's power of control for the uses of navigation (and if for any other uses, then only those that are consistent with the preservation of the stream for navigation) the riparian owner has the right to use the water of these streams which naturally flows past his riparian land for manufacturing and other purposes, and to go upon the bed of the stream and build structures necessary to make the use of the waters available. All facilities afforded by the natural con-

dition of the stream or lake adjacent to the riparian land, whether for water power or other uses, and whether developed or undeveloped, are not mere temporary and uncertain privileges but belong to the riparian land and are the private property of the riparian owner; and they cannot be taken away from him by a diversion for the use of municipalities, except by proper proceedings and upon the payment of just compensation.

*Yates vs Milwaukee*, 10 Wall. 497.

*Hanford vs Ry. Co.* 43 Minn. 104, 112.

*Gould on Waters*, Sec. 204.

*N. Y. Rubber Co. vs Rothery*, 132 N. Y. 293.

*Smith vs Rochester*, 38 Hun. 612.

*Canal Co. vs Jersey City*, 26 N. J. Eq. 294.

These rights of the riparian owner are not generally subject to any right of the State to divert the waters from their natural channel for even the purpose of navigation without making compensation; but where any paramount right to a diversion for any purpose has been recognized, (*Falls Manufacturing Co. vs. Ocento Im. Co. (Wis.)* 58 N. W. Rep. 256), it has been strictly confined to the purpose of navigation and to the extent actually necessary for that purpose alone.

*Green Bay Canal Co. vs Kaukauna Co. (Wis.)* 61 N. W. 1121.

The property rights of the riparian owner to the use of the water being thus qualified only by the sovereign power of control which, from its nature, excludes the idea of destruction or diversion, the right which municipalities have or can obtain to divert water for public use to the damage of lower proprietors, remains the same in the case of navigable streams as in the case of those which are private or unnavigable. The municipality or public water works company has not, and can-

not obtain, any right to divert navigable fresh water for public supply to the damage of lower riparian owners, without making compensation in duly authorized proceedings.

*Cooley Const. Lim.* p. 691.

*Gould on Waters*, Sec. 204.

*Angell Water Courses*, Chap. XI.

*Smith vs. Rochester*, 92 N. Y. 484.

*Sweet vs. Syracuse*, 129 N. Y. 317.

*Meyers vs. St. Louis*, 8 Mo. Ap. 266.

*Walker vs. Board of Public Works*, 16 Ohio 540.

*Saunders vs. R. R. Co.*, 144 N. Y. 75.

The only exceptions to the rule thus stated, arise in certain instances in the states of Pennsylvania, New York and Massachusetts.

In Pennsylvania the old rule of "proprietary" interests in the state to the bed and to the water itself in tidal waters, has in effect been applied to navigable fresh waters, and the riparian owner on such waters has never been recognized as having the riparian rights which have always been the rule of property in other states. This is exceptional and arises from the peculiar colonial grants under which the state was settled.

*Rundell vs. Del. and Raritan Canal Co.* 14 How. 80; 1 Wall, Jr. 275.

*Monongahela Nav. Co. vs. Coons*, 6 W. & S. 101.

*Shrunk vs. Schuylkill Nav. Co.* 14 S. & R. 71.

*Canal Co. vs. Wright*, 9 W. & S. 9.

*McKeen vs. Canal Co.* 49 Pa. St. 424.

*Philadelphia vs. Collins*, 68 Pa. St. 106.

*Philadelphia vs. Gilmartin*, 71 Pa. St. 140.

*Fulmer vs. Williams*, 122 Pa. St. 191.

*Williams vs. Fulmer*, 151 Pa. St. 405.

Again in New York, in certain cases upon the Mohawk and Hudson rivers, on account of the early grants by which

the State of New York acquired jurisdiction over those rivers, a certain interest of a proprietary nature has been said to belong to the State in addition to its general rights as sovereign. And on these streams and for these particular reasons many of the early New York cases recognize a right as remaining in the State to divert, and to authorize a diversion of, the waters of these streams without providing for compensation for damages to lower proprietors. If authority at all, these cases must be considered simply as decided under an exceptional state of facts. But they have been repudiated by the highest Court of New York, as shown by many recent decisions. In one of these decisions (the Rumsey case) the New York Court of Appeals says, that since the time of these early decisions these questions of riparian rights and of the interest of the State in the control of navigable waters, "have been elaborately examined, discussed and settled in all the courts", and it is clearly shown that the Courts of New York do not recognize these early cases as authority even as to the rights of riparian owners upon the Mohawk and Hudson rivers, to which streams those cases were confined. The general rule in New York both as to the rights of riparian owners and as to the extent of the control which the State has in navigable waters is now the same as in other States.

*Gould vs R. R. Co.* 6 N. Y. 522.

*People vs Canal Appraisers*, 33 N. Y. 461.

*Crill vs City of Rome*, 47 How. Rep. 398.

*People vs Tibbetts*, 19 N. Y. 523.

*Smith vs Rochester*, 92 N. Y. 463.

*Rumsey vs R. R.* 133 N. Y. 79.

In Massachusetts there is an exceptional line of decisions which are based also upon peculiar grants by which the State acquired jurisdiction over the territory and the waters in question.

The right of the State in the "great ponds" of Massachusetts has been a fruitful source of discussion and litigation. By virtue of a colonial ordinance of 1647 and the early grants referred to, in Massachusetts, the State is held to have a proprietary title and interest in the great ponds of the state, which is similar to the interest obtained by an individual grantee, like that, for instance, of the grantees of Humphrey's pond, situated in Lymfield and Danvers. This leaves in the State a peculiar jurisdiction and power over those great ponds. It is something entirely different and of much broader scope than the sovereign interest or power of control which is reserved to other States in their navigable waters for the purpose of navigation; and has arisen in an entirely different way. Every riparian owner upon a great pond, or upon a stream issuing from a great pond, in the State of Massachusetts takes and uses the water for power or other purposes, subject to this extraordinary power and title which has been retained in the State. The State, then, may authorize a diversion of the waters from such a pond for the purpose of public water supply, and may use its discretion as to whether or not, it will require the payment of compensation for damages to lower proprietors. So, in a decision rendered in 1883, it was held that the act of the State Legislature of 1871 authorized the city of Fall River to take water from Watuppa pond for public supply; but as the act provided that compensation should be made for damages to lower mill owners, it was held that such compensation must be made. Under this act the city of Fall River paid for the right to take one and one-half million gallons a day; but to supply an increased demand, the city obtained passage of another act in 1886, which authorized it to make further abstraction or diversion of the waters of this pond,

and in this act it was expressly provided that the city should not be compelled to pay compensation for damages to the lower proprietors. The Supreme Court of Massachusetts held, by majority decision, that, on account of this extraordinary proprietary right which had been reserved to the State it had the power through its Legislature to authorize a diversion without providing for compensation. This latter decision is, in many places, spoken of as an overruling of decision made five years before; but a careful consideration of it shows that the difference in the result was due solely to the fact that in one act of the Legislature the State had made compensation as a condition for the taking, and in the later act it had expressly provided that compensation need not be made. The only reason why the Court claimed for the State the power to use its discretion in a matter of requiring compensation was the fact, that by virtue of the early colonial grants and the ordinance of 1647, it had a proprietary interest in waters of the great ponds, which other States, except in those instances which we have named, do not have; and this is the only ground on which any such discretion could be based. It cannot be based on any distinction between riparian rights on lakes and ponds and those on running streams.

*Watappa Reservoir Co. vs. Fall River*, 147 Mass. 548.

*Watappa Reservoir Co. vs. Fall River*, 134 Mass. 267.

3 *Harvard Law Review* 1.

*Lamprey vs. State*, 52 Minn. 181.

These exceptional decisions have been expressly repudiated by the Supreme Court of Minnesota. That Court has said:

"The old common law doctrine, or at least what has been generally assumed to be such, and which was adopted in some of the early American colonies, that the crown had a *jus privatum*, or right of private property, in navigable waters and their

shores, which it could alienate to a subject has no place in the jurisdiction of this State.

"It is the settled law with us that the rights of the State in navigable waters and their beds are sovereign and not proprietary, and are held in trust for the public *as a highway*, and are incapable of alienation."

*Bradshaw vs. Duluth Imperial Co.*, 52 Minn. 59, 65.

In order to make our list of exceptional decisions complete, we next refer to a decision of the Vermont Supreme Court which is the only decision in any way appearing to contradict the doctrine laid down in the case of *Emporia vs. Soden*, already cited. This Vermont case involved the question of the right of an upper municipality to divert for city use the waters of a small, unnavigable stream to the damage of a lower municipality using the waters of the same stream for the same purpose. The statement is made in the decision that, what an upper individual riparian owner could do, a municipal corporation could do, in behalf of its inhabitants collectively, whether those individual inhabitants are riparian owners or not; but the facts in the case show that it cannot be cited as authority against what is contended for now by these plaintiffs in error. That decision may logically be cited as establishing a rule as between two municipalities on the same stream, but for nothing further. It can have no weight in these cases, for the Minnesota Supreme Court, in its decision in these cases, assumed the general rule laid down in the case of *Emporia vs. Soden* to be the law.

*Barre Water Company vs Carnes et al.*, 65 Vt. 626.

The case of *Mayor vs Spring Garden*, 7 Pa. State 348, is also not contradictory to the rule laid down in *Emporia vs. Soden*, for the reason that the *Spring Garden* case was a case of a diversion from a navigable river allowed without compensa-

tion, in accordance with the exceptional state of affairs existing in Pennsylvania which has already been pointed out.

Without, then, going into the Minnesota decisions upon the subject, and without considering whether, in case it was within the power of the legislature and courts of Minnesota to establish a different rule, they have attempted to do so—what has already been said points unmistakably to the conclusion which we have drawn from the authorities already cited, to-wit: That the general principles of law governing the property rights of plaintiffs in 1856, and up to the present time are, as against this diversion, such that they cannot be prejudiced by any court decision or statute of the state of Minnesota, and that, as against the diversion authorized by the statute of 1885, the plaintiffs had a vested property right as riparian owners to the use of all the waters in the river for the purpose of their water power, which right could not be taken away or diminished for the purposes of defendant without just compensation.

## 2.

**The doctrine of this court, in the cases of Hardin vs. Jordan and Packer vs. Bird, to the effect that the extent of the prerogative of the State to the lands under water upon a navigable stream depends upon the laws of each State, does not leave it to the legislature or courts of Minnesota to determine, beyond the power of review by this court, that the prerogative of the State extends to the diversion of the waters for purposes other than those of navigation and to the damage of lower proprietors.**

This point has already been touched upon; but we wish to emphasize it in this part of our argument.

After discussing the principles of public policy, which

have reserved to the state, as sovereign, a certain control in the beds and waters of navigable, fresh streams and lakes in this country, this court says in *Barney vs. Keokuk*.

"If they (the states) choose to resign to the riparian proprietors rights which properly belong to them in their sovereign capacity, it is not for others to raise objection."

*Barney vs. Keokuk*, 94 U. S. 324, 338.

And again: "The Courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grant; but whatever incidents or rights attach to the ownership of the property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee."

*Packer vs Bird*, 137 U. S. 661, 667.

It is also said: "It depends upon the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised."

*Hardin vs Jordan*, 140 U. S. 371, 382.

But in all these cases, the discussion was as to the rights which the State had reserved to it in the lands below ordinary high water mark; and the discussion was as to what rights the State could exercise over those lands and the waters upon them in regard to the control of the waters, when left in their natural condition, or as to changes for the purpose only of navigation. It was a discussion of what rights, (which would otherwise belong to the State as sovereign or otherwise), the State could release to the riparian owner or restrain the riparian owner in the use of. There is nothing in these decisions which can be cited in support of the proposition that there is left to

the State the right to take the waters of a natural stream away from its natural channel, to the injury of riparian proprietors using the water for the purposes of power, and arbitrarily devote them to uses which are inconsistent with the purpose of navigation, without making compensation to the riparian owner. As we have already attempted to show, as against any such attempted diversion, the rights of the riparian proprietors are those which attach as property rights to their lands; and as against those property rights of the riparian owner, the prerogative right of the State to divert the water for the purposes shown in the cases at bar does not extend. The assertion of such a prerogative is one which impairs the right of the riparian owner, and lessens the rights which he has by virtue of his riparian land. All this riparian land of these plaintiffs came to them almost directly by the grants from the United States government. Those grants do not reserve to the sovereign the right claimed by defendant in these cases. The State of Minnesota, therefore, as sovereign, never acquired such a right. And this court will examine and determine upon the limitations of the prerogative right which has been acquired and now held by the State. In defining the source and limitations of the sovereign power of the State in the bed and waters of navigable streams, this Court has said:

"It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either to the waters or the soils under them."

This Court further says:

"The courts of the United States will construe grants of the general government without reference to the rules of construction adopted by the States in their grants; but whatever incidents or rights attached to the ownership of the property

conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants and the use and enjoyment of the property by the grantee. As an incident to such ownership the right of the riparian owner where the waters are above the influence of the tide, will be limited according to the law of the State, either to low or high water mark, or will extend to the middle of the stream."

*Packer vs Bird, 137 U. S. 616.*

These decisions, together with other decisions of this Court, like the Illinois Central Railroad decision, above cited, show that limitations have been placed upon the prerogative right of the State, and that those limitations exclude the right of the State to divert the waters for the purposes like those shown in the cases at bar.

The Legislature and the State Courts, then, cannot assert a prerogative right to divert the waters of a navigable stream for the purposes shown in these cases without taking away property rights of riparian owners situated as plaintiffs are. Accordingly, it is not in these cases necessary to go any further in our argument, in order to show that private property has been taken without due process of law.

But we will next assume for the purpose of the argument of our next two propositions, that the State of Minnesota as against the riparian rights claimed by the plaintiffs to the use of the water for power, had the right to assert and hold to itself the prerogative to make the diversion complained of; and we shall show (1) that by its Legislature the State of Minnesota in 1856 gave and released forever to these plaintiffs such rights and privileges, that from the time of their charters they have held the right to use all of the water naturally flow-

ing in the river past their lands for the purpose of power, free from the right of the State to divert in the manner complained of without making compensation; (2) that under the Law of the State of Minnesota as shown by the decisions of its highest Court, in regard to the rights of riparian owners upon navigable streams, and especially in regard to the rights of these plaintiffs upon the stream, the State of Minnesota has fixed in plaintiffs the property rights which they here claim to the use of the water.

## 3.

**Even if the State of Minnesota would otherwise have had and retained a prerogative right to make the diversion complained of, it granted and released to plaintiffs by their charters such rights and privileges as gave to plaintiffs a property right to the use of all the natural flow of the Mississippi past their lands for power, which the State could not thereafter take away or diminish without making compensation.**

The provisions of the charters of plaintiffs which were passed by the Territorial Legislature in 1856 have already been quoted, and they are shown in full in the Appendix hereto attached. This was a law and grant which it was within the power of the Territorial Legislature to make.

*See Organic Act of Minnesota Appendix hereto.*

These grants became binding upon the State of Minnesota after its organization.

*See Act authorizing State government, Constitution of Minnesota, and Act of Admission into Union, Appendix hereto.*

The record shows that immediately upon the passage of these charters, the plaintiffs entered upon the maintenance and improvements of the water power and have ever since maintained it at great expense (page 26, Transcript). These acts constitute an acceptance of the grant conferred by the State; and having thus been acted upon, the grant was irrevocable, so far as any attempted revocation should be injurious to the plaintiffs in the exercise of the rights conferred by the charter.

*Shively vs Bowlby, 152 U. S. 1.*

*Monongahela Nav. Co. vs U. S. 148, U. S. 312.*

*Boyd vs U. S. 116, U. S. 616.*

The Minnesota courts have always recognized the rights of plaintiffs to maintain the dams and to use the power in the river.

*Morrill vs St. A. F. W. P. Co., 26 Minn. 222.*

*State vs Minneapolis Mill Co., 26 Minn. 229.*

*St. A. F. W. P. Co. vs Minneapolis, 41 Minn. 270.*

Indeed, in the very decisions in these cases, the Supreme Court of Minnesota says:

"Appellants are corporations created in 1856, by acts of the Territorial Legislature, and authorized to build and maintain dams in the Mississippi river at the Falls of St. Anthony, about ten miles above St. Paul, for the development of water power and for the use and sale of such power. One of these corporations, owning the shore on the East side of the river erected a dam to the proper point in the river channel, and the other, owning the West shore built its dam so as to connect the two, thus forming a power, which has ever since been maintained and used."

*Page 77 Transcript in these cases. (56 Minn. 485).*

Still in a further part of the same decision the State court holds that

"The rights under their charters are, equally with their rights as riparian owners, subordinate to these public uses."

This part of the decision in which the plaintiffs rights under their charters are held to be subordinate, is not binding upon this Court at this time, as it is one of the very questions to be determined. We are not now urging these provisions of the charters of plaintiffs on the ground of contract rights; but on the ground that if the State had rights reserved to itself over the flow and use of the waters of the river, it released them to plaintiffs by the grant in these charters which gave to plaintiffs a property right, and which could not be taken away or restricted thereafter, without making compensation. This being a property right and the statute of 1885 diminishing it without compensation, that statute operates to deprive the plaintiffs of their private property without due process of law.

## 4.

**If the question of plaintiffs' property rights to the use of the water for power is to be determined by the decisions of the Supreme Court of the State of Minnesota, these decisions, from the first to the last, show, that the riparian rights claimed by plaintiffs were property rights and were not subject to be taken away or diminished by the State for any purpose, without compensation.**

Up to the time of the decision in question, there was nothing in the decisions of the Supreme Court of the State of Minnesota to indicate that any such rule as is laid down in the decision in the cases at bar would or could be asserted by the State. The decision in these cases does not contain one single citation from Minnesota, or from any other jurisdiction. No attempt is made to base this decision upon anything which the

Supreme Court of Minnesota has ever before said upon the subject of riparian rights in navigable streams.

On the contrary, all previous decisions of the Minnesota Supreme Court upon the subject had not only pointed directly to the rule of property which is contended for in these cases by plaintiffs, but those decisions had clearly fixed and established the rule of property which we contend for. And among those decisions are several which apply to these very plaintiffs in regard to the identical riparian rights which are here in question.

As a rule of property, the State Supreme Court has decided that riparian owners on a navigable stream hold the fee to low water mark. They hold an absolute and unqualified fee to ordinary high water mark. Between ordinary high water mark and low water mark, the fee is qualified to the extent that it is subject to the use and control of the State over the bed and waters for the purpose of navigation.

*Schurmier vs R. R. Co., 10 Minn. 82 (Gil. 59).*

*Wayzata vs Ry. Co., 50 Minn. 438 (52 N. W. 913).*

*Wait vs May, 48 Minn. 453.*

*In re Minnetonka Lake Improvement, 56 Minn. 513.*

*Also decisions cited below.*

Without further comment at the present time, we now call attention to the course of decisions of the Supreme Court of Minnesota, upon the subject of riparian rights upon navigable streams. They all lead down to the result which is stated below in the Hanford case; and the inevitable conclusion deducible from these decisions is:

THE DECISIONS OF MINNESOTA HAVE FIXED AND ESTABLISHED IN THE RIPARIAN OWNER UPON A NAVIGABLE STREAM THE PROPERTY RIGHT TO THE USE OF ALL THE WATER FLOWING

PAST HIS LANDS FOR THE PURPOSE OF POWER, AND TO GO UPON THE BED OF THE STREAM AND ERECT STRUCTURES TO IMPROVE THAT POWER; AND THAT ALL THE POWER AND ADVANTAGE AFFORDED BY THE NATURAL FLOW OF THE RIVER OPPOSITE HIS LAND BY MEANS OF THOSE STRUCTURES ARE VESTED, PRIVATE PROPERTY RIGHTS, WHICH CANNOT BE TAKEN AWAY FROM HIM BY THE STATE FOR ANY USE, WITHOUT COMPENSATION; AND, FURTHER, AS REPEATEDLY STATED IN THE HANFORD CASE, THOSE PRIVATE PROPERTY RIGHTS OF THE RIPARIAN OWNER ARE SUBORDINATE ONLY TO THE SOVEREIGN POWER AND CONTROL OF THE STATE OVER THE BED OF THE STREAM FOR THE PURPOSES ONLY OF NAVIGATION.

We quote from the decisions:

In 1865 in the case of Schurmier vs St. Paul & Pac. Ry. Co. the Supreme Court of Minnesota said:

"The further question is presented whether the riparian owner takes to high water or low water mark, or to the middle thread of the stream. At common law, grants of land bounded on rivers above tide water, carry the exclusive right and title of the grantee to the middle thread of the stream, unless an intention on the part of the grantor to stop at the edge or margin is in some manner clearly indicated; except that rivers navigable in fact are public highways, and the riparian proprietor holds subject to the public easement. In this case no intention is in any way indicated to limit the grant to the water's edge, and if the common law prevails here, Roberts, by his purchase, took to the centre of the river, including the land subsequently surveyed by the government—called Island No. 11—and which is now claimed by the defendants. The common law of England, so far as it is applicable to our situation and governments, is the law of this country in all cases in which it has not been altered or rejected by statute, or varied by local usage under the sanction of judicial decisions. 2 Kent Com. 27-8.

"We think, in respect to the rights of riparian owners it is as applicable to the circumstances of the people in this country as in England. It is not true in fact, as has been alleged,

that the navigability in fact of a river above the flowing of the tide is a state of things unknown to or unprovided for by it. See Hale, *Treatise De Jure Maris*, etc., part 1, ch. 3. In its application to cases like the one under consideration it has not been varied or rejected in this state, and the few states of the Union that have repudiated it are exceptions to the general rule. *Jones vs Soulard*, 24 How. U. S. 41 and cases cited in brief of counsel of defendant in error; *Gavit vs Chambers*, 3 Ohio, 496; *Middleton vs Pritchard*, 4 Ill. 510; *Ex Parte Jennings*, 6 Cow. 518 and note; *Palmer vs Mulligan*, 3 Caines, 318 and note; 3 Kent Com. 427 et seq., and cases cited in note; 2 Smith's Lead. Cas. 217-227; *Angell Water Courses*, ch. 1, and cases cited; 2 Wash. Real Prop. 632 and notes.

"Some—we believe most—of the authorities that deny that the riparian proprietor owns to the middle thread of the stream, holds that he takes to the low water mark. See *Halsey vs McCormic*, 13 N. Y. 296; *Morgan vs Reading*, 3 Sme. & Mar. 366; *Child vs Starr*, 4 Hill 369; *Blanchard vs Porter*, 11 Ohio 138; 2 Smith Lead. Cas. 224-6, and cases cited. This we think would include the land claimed by the defendant, and designated "Island No. 11." We hold therefore, that by the patent to Roberts, the United States conveyed to him said "island."

"We think no reason can be given why the same rule should not apply to grants made by the government that are applicable to grants made by individuals. Section 9, of the act of congress, first above cited, provides that all navigable rivers within the territory to be disposed of by virtue of that act, shall be "deemed to be and remain public highways." At common law rivers navigable in fact are public highways and the riparian owner holds subject to the public easement. This act of congress, therefore, is merely a declaration or affirmation of the common law and not a modification of it. The fact that these rivers are, and must remain public highways, is not at all inconsistent with the view, that riparian owners have the fee of the bed of the stream. *Peck vs Smith*, 1 Conn. 133."

*Schurmeir vs St. Paul & Pacific R. R. Co.*, 10 Minnesota, 82-102 (59-75).

In 1876, in case of *Brisbine vs St. Paul & S. C. R. R. Co.*, the Minnesota Court said: Quoting first from the syllabus, which in Minnesota is prepared by the Supreme Court:

(Syllabus).—"The owner of a piece of land bordering on the Mississippi river, purchased from the United States, and comprising a block of land in a city, and a narrow strip between such block and the river, continues to be a riparian proprietor, though such strip has become a public street by a common law dedication; and even after he has conveyed such block, describing it in his deed as extending to the street, he continues to be a riparian proprietor in respect of his ownership of the fee of that half of the street between the center thereof and the river. As such riparian proprietor he holds the fee to low-water mark, *subject to the public easement of navigation*, and with all the rights of other riparian owners as detailed in the opinion; and he is entitled to compensation in respect of those rights, from a railway company that seeks to condemn for the purpose of its railway, the land between the center of the street and the center of the channel of the river.

(Decision).—"In this latter case the absolute title in fee of all the land between such dividing line and the river at low-water mark undoubtedly remained in the plaintiff, together with all such riparian rights as follow the ownership of real estate bordering upon a navigable stream. What these rights are, especially in regard to land acquired originally from the United States, and bordering, as this does, upon the Mississippi river, we regard as fully and correctly settled by the Federal Supreme Court. *Dutton vs Strong*, 1 Black 23; *Railroad Co. vs Schurmeier*, 7 Wall. 272; *Yates vs Milwaukee*, 10 Wall. 497. According to the doctrine of these decisions, the plaintiff possessed the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain, for his own and the public use, suitable landing places, wharves, and piers, on and in front of his land, and to extend the same therefrom into the river, to the point of navigability, even though beyond low-water mark, and to this extent exclusively to occupy, for such and like purposes, the bed of the stream, *subordinate and subject only to the navigable rights of the public, and such needful rules and regulations for their protection as may be prescribed by competent legislative authority*. The rights which thus belonged to him, as riparian owner of the abutting premises, were valuable property rights, of which he could not be divested without consent, except by due process of law, and if for public purposes, upon just compensation. *Yates vs Milwaukee*, 10 Wall. 497.

"If, as is claimed by defendant, Water street was in fact a street lawfully dedicated to public use as such, whatever its actual width—whether occupying the whole or only part of the intervening space between the block and the river—the fee of the south or river-side half thereof remained in the plaintiff subject only to the specific easement created by the act of dedication. Banks vs. Ogden, 2 Wall. 57. No additional servitude could be imposed upon it against his will, except for some public purpose, and upon compensation as provided by law. The company had no right to occupy it for the purposes of its road, nor could it acquire any such right from the city of St. Paul. Gray vs. First Div. St. Paul & Pacific R. Co., 13 Minn. 315; Schurmeier vs. St. Paul & Pacific R. Co., 10 Minn. 82. Being such owner in fee of this half of the street, even though no soil was left remaining between it and the river at low-water mark, he was a riparian proprietor of land bounded by a navigable stream, and certainly possessed of all the rights appurtenant to such ownership. Banks vs. Ogden, 2 Wall. 57; Yates vs. Milwaukee, 10 Wall. 497."

*Brisbane vs. St. P. & S. C. R. Co.*, 23 Minn. 114.

In 1879, in the case of *Morrill vs. St. A. F. H. P. Co.*, the rights of this plaintiff in error, the St. Anthony Falls Water Power Company, were further discussed. The Supreme Court said: Quoting first from the syllabus:

(Syllabus),———"The riparian owner upon a navigable stream may use the water flowing past his land for any purpose, so long as he does not impede the navigation, in the absence of any counter claim by the State or United States.

(Decision),———"We do not intend to discuss the question whether riparian owners have rights in navigable waters, absolute as against the State, and which the State cannot take away without making compensation. That they have rights absolute as to every one unless the State, is undoubtedly, and the proviso was inserted to save those rights.

\* \* \* \* \*

"It is now settled by the decisions of the court of last resort that under the acts of congress providing for the survey and sale of the public lands, the patentees of lands bordering on the Mississippi river, and its tributaries take only to the stream

—at furthest, to low water mark—leaving the title to the bed of the stream below low water mark in the government. Those streams, below low water mark, stand, therefore, in respect to the rights of the government and individuals in them, the same as tidal rivers. The rights of riparian owners are the same in both.

"Owners of lands bordering on navigable rivers and lakes—those navigable in the common-law sense, and those navigable under acts of congress—have rights in respect to the waters of such rivers and lakes, *peculiar to such owners, and not possessed by others.* Dutton vs Strong, 1 Black, 23; Railroad Co. vs Schurmeir, 7 Wall. 272; Yates vs Milwaukee, 10 Wall 497; Rose vs Groves, 5 Man. & Gr., 613; Duke of Buccleuch vs Metropolitan Board of Works, L. R. 5 H. L. 418; Metropolitan Board of Works vs McCarthy, L. R. 7 H. L. 243; Lyon vs Fishmongers' Co., 1 L. R. App. Cas. 662; Delaplaine vs Chicago & Northwestern Ry Co., 42 Wis. 214; Brisbne vs St. Paul and Sioux City Ry Co., 23 Minn. 114. The case of Atlee vs Packet Co., 21 Wall., 393 does not deny this proposition. It decides that the riparian owner, as such, has no right to construct piers in the navigable portion of such a river, and is entirely consistent with Dutton vs Strong, 1 Black, 23, which affirmed the right to construct a pier or wharf out to the point of navigability.

"No case or text book that we have found has attempted to define or limit the uses which the riparian owner may make of navigable waters, as those waters are seldom capable of any use except for navigation. Whenever specific riparian rights have come in question, they have generally been connected with navigation, such as the right to construct and maintain wharves and piers for access from the land to the water. Other cases, like Railroad Co. vs Schurmeir, 7 Wall. 272, and Brisbne vs St. Paul & Sioux City R. Co., 23 Minn. 114, have mentioned the right to construct wharves and piers, not to confine riparian rights to such structures, but to illustrate the proposition that the owner of the banks has peculiar rights in the stream.

"There is a class of cases, among them Lansing vs Smith, 4 Wend. 9; People vs Tibbetts, 19 N. Y. 523; Gilman vs Philadelphia, 3 Wal. 713 which hold that riparian rights in navigable waters are subordinate to those of the State, and cannot in any manner interfere with the exercise of such

public rights. These latter cases have no bearing on this, for here there is no attempt by the State to exercise the public power.

"There are several cases in which the courts, *arguendo*, have indicated that the owner of the bank may make any use of the water adjoining his land not inconsistent with the public right, nor in opposition to the state. The only statement of a foundation for such a right, that we can find is in the opinion of Lord Selborne in Lyon vs Fishmongers' Co., I. L. R. App. Cas. 662, where he says "the rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturae*, because his land has by nature the advantage of being washed by the stream."

"In People vs Tibbetts, 19 N. Y. 523, it is said: "The riparian owner may undoubtedly use the water passing or adjoining his land for his own advantage, so long as he does not impede the navigation, in the absence of any counter claim by the state as absolute proprietor." In Delaplaine vs Chicago & Northwestern Ry. Co., 42 Wis. 214, "all the facilities which the location of his land with reference to the lake affords, he has the right to enjoy, for purposes of gain or pleasure."

\* \* \* These rights of user and exclusion are connected with the land itself, grow out of its location, and cannot be materially abridged or destroyed, without inflicting an injury upon the owner which the law should redress." And in Canal Appraisers vs The People, 17 Wend. 571, Senator Tracy, in support of the right of the state to interfere with riparian rights without making compensation, said: "We may also take the case of the tide mills on Long Island, where the owners of the lands on the inlet of the sea possess an undoubted right to use the water for their private emolument, and where the capability of availing themselves of this water-power may constitute the chief value of the adjacent land."

"Dutton vs Strong, 1 Black, 23 affirmed the right of a riparian owner on a navigable lake to build and maintain, for his own exclusive use and benefit, a pier into the lake as far as the point of navigability. The right to encroach upon the shallow water of the lake, by an exclusive appropriation even of the underlying soil, must rest upon the proposition that the riparian owner may make any use of the lake or river opposite his land not inconsistent with the public right.

"As it seems to us, none of these opinions state the right

too strongly. If the right exists, *jure naturae*, because the land has, by nature, the advantage of being washed by the stream, it is impossible to see how any such distinction as defendant claims can be made as to the peculiar uses which the riparian owner may make of the waters. *The limit to the private right is imposed by the public right, and the private right exists up to the point beyond which it would be inconsistent with the public right.*

"We think the right in the riparian owner to put the water to any useful purpose may be sustained by considerations of public policy. It is certainly for the interests of the public that where the waters of a navigable stream may, without interfering with the public right, be put to some useful purpose, the right to so use them should exist.

"We will state the rule at which we have arrived nearly in the language of the Court in *People vs Tibbetts*, 19 N. Y. 523: *The riparian owner may undoubtedly use, for any purpose, the water of a navigable stream passing or adjoining his land, for his own advantage, so long as he does not impede the navigation, in the absence of any counter claim by the State or United States as absolute proprietor.* The conclusion follows that, as between these parties, the plaintiffs have a right to the natural flow of the water past their land, and any interference with this flow, to their injury, is a wrong for which they are entitled to an appropriate remedy. To prevent such a wrong, injunction is an appropriate remedy."

*Morrill vs St. Anthony Falls Water Power Co., 26 Minn. 222.*

It will be noticed that in the last case, the Supreme Court expressly refrains from deciding (1) to what extent the control of the State extends, (2) and also refrains from deciding, whether by virtue of any power which the State may have, it may deprive the riparian owner of its use of power without compensation. On all these points the decision is unsettled, and shows an evident unwillingness to define or limit its position on either of these two questions, for the reason partly, as stated by the court, that the adjudicated cases at that time do not seem to the court to have definitely covered the question.

The court in that case says: ,

"The riparian owner may undoubtedly use, for any purpose, the waters of a navigable stream passing or adjoining his land, for his own advantage, so long as he does not impede the navigation, in the absence of any counterclaim by the State or of the United States *as absolute proprietor.*"

In order to show the utter insignificance of this statement, as against the present position of plaintiffs in error, we wish right here to show that the same court afterwards decided that the State could not have and did not have any rights whatever as absolute proprietor. This was decided in 1892, in the case of *Bradshaw vs Duluth Imperial Mill Company*, in which the Supreme Court Said:

"It has been decided over and over again by this court that the right of the riparian owner to improve, reclaim and occupy the submerged land in front of his shore estate to the point of navigability is a vested property right, which cannot be taken away, even by the State for a public use, without compensation. *Brisbine vs St. Paul & Sioux City R. R. Co.*, 23 Minn. 114; *Union Depot, etc., Co. vs Brunswick*, 31 Minn. 297 (17 N. W. Rep. 626); *Hanford vs St. Paul & Duluth R. R. Co.*, supra. The old common law doctrine, or at least what has been generally assumed to be such, and which was adopted in some of the early American colonies, that the crown has a *jus privatum*, or right of private property, in navigable waters and their shores, which it could alienate to a subject, has no place in the jurisprudence of this State. It is the settled law with us that the rights of the State in navigable waters and their beds are sovereign, and not proprietary, and are held in *trust for the public as a highway*, and are incapable of alienation. *Union Depot, etc., Co. vs Brunswick*, supra; *Hanford vs St. Paul & Duluth R. R. Co.*, supra."

*Bradshaw vs Duluth Imperial Mill Co.*, 52 Minnesota 59.

*Cited and approved in Gilbert vs Emerson*, 55 Minn. 259.

Now continuing with the course of Minnesota decisions, we next cite the case of *State vs Minneapolis Mill Company*,

decided in 1879. In that case the tax assessor had computed the number of mill powers which were created by the water of the Mississippi and the dams of this plaintiff in error, the Minneapolis Mill Company, and had assessed them as so many mill powers under the head of "personal property." The tax was opposed by the Minneapolis Mill Company, on the ground that those mill powers arose from the riparian rights of the Mill Company as owner of the riparian lands, and were therefore part and parcel of the riparian land which would go to enhance the value of the land itself, but which could not be taxed as separate property. This proposition was sustained by the Minnesota Supreme Court, and the court in the decision said:

"In the recently decided case of Morrill vs St. Anthony Falls Water Power Co., ante, p. 222, we had occasion to consider the question of the rights of riparian proprietors upon the Mississippi River. The general rule arrived at was that a riparian owner may use the waters of a navigable stream adjoining his land, for any purpose, for his own advantage, so long as he does not impede navigation, and in the absence of any counter claim by the state or the United States. As the riparian owner has this right to the use of the water, he has a right to enjoy it and make it available; otherwise, his right would be a worthless abstraction. *He may, therefore, subject to the limitations of the general rule before stated, use the bed of the stream, if necessary or convenient to the enjoyment of his right to the use of the water.* *He may erect dams there, and such other structures as will promote and facilitate the enjoyment of this right.* For these purposes the riparian proprietor may properly be said to have, if not an interest, certainly a right, in the bed of the stream, itself. The right of a riparian proprietor upon a navigable stream, such as the Mississippi, rests as is held by this court in the case above cited, upon the fact of riparian ownership; that is to say, the riparian proprietor possesses this right because he owns the land upon the bank, and this is equivalent to saying that the right is attached as an incident to the riparian land, and belongs and appertains to the

same. Whether the right of the riparian proprietor to the use of the water can be severed from the ownership of the land, so that the right is owned by one person and the bank by another, and, if this could be and was done, what would be the character of the property of the owner of the right, as real or personal, are questions not raised by the facts of this case. The defendant is the owner of the bank, and of the right to the use of the water, and, therefore, of the right to make his right to the use of the water available by using the bed of the stream. In the defendant's hands the riparian land, and the right to the use of the water, and to the use of the bed of the stream, are held together. The principal, which is the riparian land, draws to it the incident, which is the right to the use of the water, so that the latter is part and parcel of the former. The defendant's right, as riparian proprietor, to the use of the water is not conferred by the provision before quoted from its charter. The effect of this section is to define the corporate powers of the company, and to signify the assent of the government to the use of the river, in the manner and for the purposes in said section mentioned.

"It follows from what we have said that the defendant's right to the use of the water is, for all purposes of taxation, real property and not personal, for our tax law provides that "real property, for the purposes of taxation, shall be construed to include the land itself, \* \* \* and all rights and privileges belonging or anywise appertaining thereto." The leased water-powers which are sought to be taxed as personal property in this case, are merely a part of the defendant's right to the use of the water. They are, therefore, real and not personal property, and hence it follows that, in our opinion, they were improperly taxed as personal property."

*State vs Minneapolis Mill Company, 26 Minn. 229.*

At this place we will also call attention to the fact that the rights of the plaintiff in error, the St. Anthony Falls Water Power Company were again recognized, in a later decision, which does not attempt to define the extent of the sovereign power or control of the State.

*St. A. F. W. P. Co. vs City of Minneapolis, 41 Minn 270.*

Again in 1883, in the case of *Union Depot Co. vs Bruns-*

wick, the Supreme Court of Minnesota said, quoting first from the syllabus:

(Syllabus). "It is the settled law of this state that a riparian owner upon a navigable stream has the fee to low-water mark. But in addition to this, he has, as incident to his ownership, certain riparian rights, among which are the right to enjoy free communication between his abutting premises and the navigable channel of the stream, to build and maintain suitable piers, landings, or wharves on and in front of his land, and to extend the same therefrom into the stream to the point of navigability even beyond the low-water mark, and to this extent exclusively to occupy, for such and like purposes, the bed of the stream, *subordinate only to the paramount public right of navigation*. These riparian rights are property, and cannot be taken away by the state without paying just compensation therefor."

(Decision). "At common law, the king as representative of the nation, held in trust for them all navigable waters, and the title to the soil under them. This was a sovereign or prerogative, and not a proprietary right. At the revolution the people of each state became sovereign, and in that capacity held all these navigable waters and the soil under them for their common use, subject only to the rights since surrendered to the general government. Martin vs Waddell, 16 Pet., 367; Mumford vs Wardell, 6 Wall., 436. New states, since admitted, have the same rights in these navigable waters as the original states. Upon the admission of a new state, this right of eminent domain in them, which was temporarily held by the United States, passes to the state. The patent from the United States of land on a navigable stream conveys to the patentee no title to the bed of the stream. This vests in the state as a sovereign right. Pollard vs Hogan, 3 How., 212, 222; Mumford vs Wardell, supra.

"In some states it is held (following the analogy of the common law rule applicable to waters where the tide ebbs and flows) that a riparian owner on a navigable stream has the fee only to ordinary high water. Such seems to be the tenor of the decisions of the federal courts. But, as it is wholly a matter for the state to determine the extent of its own rights, they follow on this question the decisions of the state courts.

"In this state it is the settled doctrine that the riparian owner has the fee to low water mark. Schurmeier vs St. Paul & Pac. R. Co. 10 Minn. 59 (82); Brisbine vs St. Paul & Sioux City R. Co. 23 Minn. 114. But while he only has the fee to low water mark, he has certain riparian rights incident to the ownership of real estate bordering upon a navigable stream. Among these are the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain suitable landings, piers, and wharves, on and in front of his land, and to extend the same therefrom into the river to the point of navigability, even beyond low water mark, and, to this extent exclusively to occupy for such and like purposes the bed of the stream, *subordinate only to the paramount public right of navigation.* Dutton vs Strong, 1 Black 22; Railroad Co. vs Schurmeier, 7 Wall. 272; Yates vs Milwaukee, 10 Wall. 497, supra; Rippe vs Chicago D. & M. R. Co., 23 Minn. 18; Brisbine vs St. Paul & Sioux R. Co., supra. These riparian rights are property, and cannot be taken away without paying just compensation therefor. The state could not do it or authorize any one else to do it. Yates vs Milwaukee, supra; Lyon vs Fishmongers' Co., L. R. 1 App. Cas. 662; Brisbine vs St. Paul & Sioux City R. Co., supra;

*Union Depot Co. vs Brunswick*, 31 Minn 297.

The above is the first case in which there is any attempted definition of the extent to which the control of the State extends. It is here clearly held that the power of the State is not a proprietary one, but only a sovereign one for the purpose of control for the uses of navigation. It is also held that whatever riparian rights the riparian owner has, they are "subordinate only to the paramount public right of navigation."

In that case the riparian rights mostly discussed were other than the use of the water for power; but in a later case, which we next quote from, the entire question was gone over fully and completely; and not only were the property rights of riparian owners to the use of the stream definitely stated, as we claim them for the plaintiffs in error in these cases; but the extent of the power of the State as against those rights was definitely

stated and decided, by repeated statements, to be a sovereign power of control only for the purpose of navigation. The case had been once decided by the Supreme Court with a different result on some points; and upon the re-argument, a further decision was given, overruling the first decision; and it is from this last decision which we quote. It is the case of *Hauford vs St. Paul & Duluth R'y Co.*, and was decided by the Supreme Court in 1890. The Supreme Court of Minnesota said:

"As we proceed now to notice the nature and extent of certain rights growing out of riparian proprietorship, we desire that attention should be given to the fact that those rights partake largely of the ordinary qualities of *private property*, which is in general divisible and transferable by the proprietor; that they are recognized as valuable property rights in the law; that they are of such a nature that they may be enjoyed separate from the adjacent land to which they were originally appurtenant; and to the absence of substantial reasons, so far as the nature of these rights are concerned, why they may not exist independently of the adjacent riparian estate. We do not affirm that all riparian rights are thus severable. Some from the very nature of things, may be incapable of separate existence."

"In this state the title of the proprietor of lands abutting upon navigable waters extends to low-water mark; the bed of the stream or body of water, below low-water mark, being held by the state, not in the sense of ordinary absolute proprietorship, *but in its sovereign government capacity, for common public use*. Union Depot, etc., Co. vs. Brunswick, 31 Minn. 297, (17 N. W. Rep. 626) and cases cited. THE ESTATE OR INTEREST OF THE RIPARIAN OWNER IN THE BED OF THE STREAM ABOVE LOW-WATER MARK IS **subject to the right of the public to use the same for the purposes of navigation; but restricted only by that paramount public right,** THE RIPARIAN OWNER ENJOYS VALUABLE PROPRIETARY PRIVILEGES, AMONG WHICH WE SHALL CONSIDER PARTICULARLY THE RIGHT TO THE USE OF THE LAND ITSELF FOR PRIVATE PURPOSES. A considerable extent of the shores, not only along tide-waters of the ocean coasts, but on our great inland waters, are of such a nature, out to and even beyond low-water mark, as

to be in general unavailable by the public for the purposes of navigation, and must remain forever waste and useless lands, unless reclaimed by artificial means from the shallow water covering them, or unless otherwise improved. It is established beyond question in this state, and in other states as well, that the proprietor of the riparian lands may make such improvements. *Subject only to the limitation that he shall not interfere with the public right of navigation, he has the unquestionable and exclusive right to construct and maintain suitable landings, piers and wharves into the water and up to the point of navigability for his own private use and benefit.* Rippe vs. Chicago, D. & M. R. Co. 23 Minn. 18; Brisbne vs. St. Paul & Sioux City R. Co. Id. 14; Morrill vs. St. Anthony Falls Water-Power Co., 26 Minn. 222, (2 N. W. Rep. 842); State vs Minneapolis Mill Co., 26 Minn. 229 (2 N. W. Rep) 839; Carli vs. Stillwater Street Ry. Co. 28 Minn. 373 (10 N. W. Rep. 205); Union Depot, etc., Co. vs. Brunswick, 31 Minn. 297, (17 N. W. Rep. 626); Lake Superior Land Co. vs. Emerson, 38 Minn. 406, (38 N. W. Rep. 200); Dutton vs. Strong, 1 Black 23; Yates vs. Milwaukee, 10 Wall. 497. And it is obviously immaterial, if the public interests be not prejudiced, whether the submerged land be covered with wharves of timber or stone, or be reclaimed from the water by filling in with earth, so that it becomes dry land. The land may be so reclaimed. Union Depot etc., Co. vs. Brunswick, 31 Minn. 297 (17 N. W. Rep. 626); Clement vs. Burns, 43 N. H. 609; Bell vs Gough, 23 N. J. Law, 624; Providence Steam Engine Co. vs. Providence & S. Steamship Co, 12 R. I. 348, 363. *As the right of private use and enjoyment of the improved or reclaimed premises will continue so long, at least, as it does not interfere with the limited and defined public interests, it is obvious that in general, it may continue forever.*

*"This private right of use and enjoyment is not, we think, limited to purposes connected with the actual use of the navigable water, but may extend to any purpose not inconsistent with the public right.* Rippe vs Chicago, D. & M. R. Co. 23 Minn. 18; Brisbne vs St. Paul & Sioux City R. Co., Id. 114; Parker vs West Coast Packing Co., 17 Or. 510 (21 Pac. Rep. 822). As was said in Morrill vs St. Anthony Falls Water Power Co., 26 Minn. 222, 228, (2 N. W. Rep. 842), referring to the decision in Dutton vs Strong, 1 Black, 23: "The right to encroach upon the shallow water of a lake, by an exclusive ap-

propriation, even of the underlying soil, must rest upon the proposition that the riparian owner may make any use of the lake or river opposite his land not inconsistent with the public right." The following language of the Morrill case, just cited, although used with reference to the riparian right to use the water of a navigable stream, is applicable here: "The limit to the private right is imposed by the public right, and the private right exists up to the point beyond which it would be inconsistent with the public right." No one but the riparian proprietor has the right to improve and occupy such premises for private purposes, and it does not concern other persons how or for what particular purposes the reclaimed lands may be used, so long as there is no violation of the maxim, *sic utere tuo ut alienum non laedas*. It is for the interest of the state that such lands, not available for the *public purposes for which alone the State exercises authority over them*, shall be improved and used for profitable enterprises, rather than that they lie forever waste and unproductive. And the state, while recognizing the ancient riparian right of occupancy, has not assumed to prescribe or to limit the purposes or manner of its enjoyment. That seems to have always been left to the discretion of the person in whom the right is exclusive, and the decided cases afford many illustrations of uses in no way connected with the purposes of navigation.

"*This right of the riparian proprietor, even before it has been in any manner exercised by reclaiming or improving the premises, the right itself to reclaim, improve, or occupy, is a property right, vested in him, recognized and protected in the law as property. He cannot be deprived of it without due process of law. It cannot be taken from him, and devoted to public use, without compensation.* Brisbine vs St. Paul & Sioux City R. Co., 23 Minn. 114; Carli vs Stillwater Street Ry. Co., 28 Minn. 373 (10 N. W. Rep. 205); Union Depot, etc. Co. vs Brunswick, 31 Minn. 297 (17 N. W. Rep. 626); Yates vs Milwaukee, 10 Wall. 497; Bell vs Gough, 23 N. J. Law. 624; Delaplaine vs Chicago & N. W. Ry. Co., 42 Wis. 214; Lyon vs Fishmongers' Co., L. R., 1 App. 662. Such property is subject to the law of eminent domain. A railroad company, locating its line of road over such submerged lands, might acquire, by condemnation proceedings and the payment of compensation, the necessary right of way, divesting the riparian owner of so much of his property. But cannot the riparian proprietor voluntarily

convey, for an agreed compensation, what the company could thus take from him by legal proceedings *in invitum*? If he were to convey by deed the right to occupy exclusively for railroad purposes the premises in front of the riparian lands, would not the company acquire a right to occupy and enjoy the use of the premises, although it took no interest in the up-land estate?

*"These peculiar property rights of the riparian owner may constitute, estimated in connection with the riparian land, the chief value of the premises. It may even be that the whole value of such real property consists in the right to improve and occupy the submerged lands for private purposes. The extent of the riparian right in this respect is not measured by the value of the upland, nor by the distance to which the owners' estate may extend inland from the shore. The barest strip of upland, though wholly valueless and useless in itself, justifies the owner in the exercise and enjoyment of the privileges of riparian proprietorship to the fullest extent."*

\* \* \* \* \*

**"WE HAVE THUS CONSIDERED THAT THE RIPARIAN PROPRIETOR HAS THE EXCLUSIVE RIGHT—absolute as respects every one but the state, and limited only by the public interests of the state for purposes connected with navigation—to improve, reclaim, and occupy the submerged land, out to the point of navigability, for any private purpose as he might do if it were his separate estate; that this right, even though it may never have been exercised, is recognized and protected by the law as property, of which he cannot be deprived even by the state without just compensation."**

*Hanford et al. vs St. Paul & Duluth R. R. Co., 43 Minnesota 104.*

This case was cited with approval in the case of *Gilbert vs Eldridge*, 47 Minn. 210; again in the case of *Minneapolis Trust Co. vs Eastman* 47 Minn. 301; again in the case of *City of Duluth vs St. Paul & Duluth Ry. Co.*, 49 Minn. 201; and in the case of *Bradshaw vs Duluth Imperial Mill Co.*, already quoted from above, which was decided in 1892, and is reported in 52 Minn. 59.

Lest the contrary should be claimed, we wish to show further that it is the law of the State of Minnesota, that any damage to or deprivation of property, of the nature complained of by the plaintiffs in error, constitutes a "taking" of property for public use.

In the case of *Weaver vs Boom Co.*, the Minnesota Supreme Court says:

"What constitutes a taking of private property within the meaning of the constitution? We are aware that there are numerous cases in which the doctrine has been successfully invoked that for a consequential injury to private property arising from the prosecution of public improvements for the public good—notably the grading of streets—there is no redress. The principle, if properly applied, is a sound one. But many decisions have, in our opinion, gone to the uttermost limit of sound judicial construction in favor of this principle, and in some cases beyond it; as, for example, a few which hold that nothing constitutes a taking which does not amount to an actual assumption of the possession. But, as has been well said by the supreme court of the United States (*Pumpelly vs Green Bay Co.*, 13 Wall. 166, 177), 'it would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not taken for a public use.' Such a construction would be a perversion of the constitutional provision into an authority of the government for the invasion of private property, instead of a protection to the citizen. But there are abundant authorities to sustain the doctrine that a serious interruption to the common and necessary use of the property may be equivalent to the taking of it, and that under the constitutional provisions referred to, it is not necessary that the

property should be absolutely taken, and the possession directly assumed. Angell, in his work on watercourses, (section 465a) substantially states this as the law.

"It has been again and again decided to be the doctrine that overflowing land by backing water on it from dams built below constitutes a taking, within the meaning of the constitution, and that when real estate is actually invaded by superinduced additions of water, earth, sand or other material, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the constitution. \* \* \*

"The evidence in this case tends to show that the effect of building this boom was to cause the logs to collect in it, and thereby raise the water in the river, and to turn it over and upon the lands of the plaintiff, and carry with it in high water large quantities of logs and drift, which, when the water subsided, were left stranded upon these lands, so as to effectually destroy or impair their usefulness. The evidence, on this point, we think, fully sustains the fourth special finding of the jury. These acts, if allowed to continue, would constitute a taking of the property, and not a mere consequential injury, and, defendant not having acquired the right to thus take or appropriate the property by payment of compensation in the manner provided by its charter, the plaintiff could maintain an action for his damages."

*Weaver vs Miss. and Rum River Boom Co. 28 Minn. 534.*

The same court also says in the same decision:

"The State itself cannot take private property for a public use without making compensation therefor, and consequently cannot grant such power to any one else. IT CANNOT DO SO UNDER THE PLEA OF IMPROVING THE NAVIGATION OF A PUBLIC RIVER ANY MORE THAN ANY OTHER PUBLIC PURPOSE. Riparian owners upon a public water course did not acquire and do not hold their property burdened by any such reservation or implied right on the part of the state. Undoubtedly, like every other person, they hold their property subject to the right of the state to take it by paying for it whenever it becomes necessary for a public purpose; and it must rest in the wisdom of the legislature to determine when such necessity exists. The improvement of the navigation of a public river is a public purpose. The floating or rafting of logs upon a public stream is a legitimate use of it as a highway, and the taking of prop-

erty bordering upon the Mississippi river for boom purposes, in order to improve and utilize the river for that purpose, may be a taking for public use. This court so held in *Cotton vs Miss. & Rum River Boom Co.*, 22 Minn. 372."

*Weaver vs Miss. & Rum River Boom Co.*, 28 Minn. 534.

Again:

"To maintain a boom, which, in the usual course of things, will have this effect (to work damage to plaintiff's land) once or twice in the course of seven or eight years, is just as much a taking or appropriation of plaintiff's property as it would be if the like occurred every year, or every two years, or during those months of each year when the boom is in use. The taking may not have the same extent or duration, it may not exclude the plaintiff from his property for so much of the time, and consequently it may not impair his rights or damage him in the same degree as if it were permanent and constant; but as far as it goes it is nevertheless a taking."

*McKenzie vs Boom Co.*, 29 Minn. 293.

"Making one's premises a place of deposit for the surplus water in the sewers in times of high water, or creating a nuisance upon them so as to deprive the owner of the beneficial use of his property, is an appropriation requiring compensation to be made."

*Tate vs St. Paul*, 56 Minn. 527.

*See also In Re Minnetonka Lake Improvement*, 56 Minn., 513.

We here again call attention to the fact indisputably shown by the record, that at these falls the river is not navigable in fact, and there is no "point of navigability" (transcript, pp 26 and 28); and, without citing further from Minnesota decisions, we make the deduction and statement from these decisions already quoted from as follows:

By the decisions of the Supreme Court of the State of Minnesota, plaintiffs in error have a right as riparian owners to build and maintain their dams to the center of the stream, and to use for power all the water naturally flowing

past their lands and over their dams so constructed. This right is a vested private property right. If it is subject to any right at all of the State, the only right of the State to which it is subject or subordinate in any way, is, as stated in the *Union Depot* case and the *Hanford* case, expressly defined and limited to be the right of the State to control the use of the bed and waters of the stream, for the purposes of navigation; that even if the State should exert whatever paramount right it has, it can only exert that right to the damage of plaintiffs by making compensation. It certainly cannot take away or diminish the use of the power created by their dams and the entire natural flow of the river, for a purpose inconsistent with the purposes of navigation, without providing for and making just compensation for such injuries.

There is not a single decision in the State of Minnesota, except the decision in the cases at bar, which even indirectly points to an intention on the part of the State to recognize a different rule from that which is thus the inevitable conclusion from the decisions which we have quoted.

If, then, the extent of the property rights of plaintiffs in error are to be fixed by the decisions of the State courts, it has been so fixed to the full extent as claimed here for the plaintiffs in error.

It may be claimed by the defendant that because of the general statement of this court in *Hardin vs Jordan*, 140 U. S. 371, that "it depends upon the laws of each State to what extent the prerogative of the State to lands under water shall extend, upon a navigable stream," there is reserved an absolute and arbitrary right in the State to fix and change those laws at will, and that, as the State Supreme Court has said in this decision in question that the riparian rights of plaintiffs in error

were subject to be taken away by the State for other purposes than navigation without making compensation, such decision settled the question here to be determined in this court. But such was not the intent nor the construction which this court has placed upon the statement quoted from the case of *Hardin vs Jordan*, 140 U. S. 371. The rule which this court established in reference to that matter is this:

That where the state has not asserted any right or attempted to restrict the right, the rights of the riparian owners upon navigable streams, are to be governed by the general laws of the land, including the common law, so far as applicable; and that the rule of property which the state will be said to have established with reference to those rights, will be gathered, if it can be gathered, from the general trend of decisions of the state court up to the time of the decision in question.

*Kaukauna Co. vs Green Bay Co.*, 142 U. S. 254.

*Fallbrook Irrigation District vs Bradley*, 164 U. S. 168.

Where there is an exceptional decision, apparently against ordinary rules as laid down in the general current of decisions of the State court, by which a different rule might be gathered that decision will be rejected by this court and the general trend of decisions will be followed.

*Hardin vs Jordan*, 140 U. S. 371.

In view of the unqualified and clearly established rule of property laid down as above shown by the decisions of the Minnesota Supreme Court, to say that the decision of that court in the cases now being considered is to be the one from which the rule of property is to be adduced, would be to establish a rule which might be the instrument of the greatest abuse to property rights by State courts. An established property right, which

by every reasonable rule could not have been taken away from the holder without compensation, could be taken away by decision of the state court holding, simply, that, whatever the property right was or had been, it was a property right "subordinate" or "subject" to some power in the state now asserted for the first time. By such means the jurisdiction of this court, which has been conferred upon it, for the purpose of preventing arbitrary deprivations of private property by the states, would be to a very large extent taken away. Any State court could from time to time declare a species of property, which would otherwise and in all jurisdictions be understood to be absolute, as being subject to burdens which were contrary to well established principles of law governing property rights. On the faith of rules of property clearly established by State courts and all the courts of the land, holders of private property might go on for years investing and improving by permanent and expensive structures; and then by a mere declaration, unsupported and without any pretense of support from adjudicated cases, the rules of property upon the strength of which those investments and improvements had been made could be changed and property rights be taken away, without the remedy which the federal Constitution intended should be had. These questions, then, in so far as they are to be decided by the decisions of the State courts, are to be decided solely upon those decisions as they existed before the rendering of the decision complained of, and on account of which the writ of error has been issued from this court.

## 5.

**The Statute of 1885, as construed by the Supreme Court of Minnesota, has the effect, not only to deprive Plaintiffs of their private property for a public use, without compensation, but also to deprive them of that property, for a private use, without compensation.**

The record shows:

The faucets and outlet pipes through which this water is taken are in manufacturing buildings and in business buildings of all kinds in the City of St. Paul.

*Page 49 Transcript.*

"In St. Paul there are a large number of public buildings \* \* \* boot and shoe manufactories, buildings that are run by steam boilers, and other manufacturing buildings that are run by steam. We supply water for some of these buildings, and for some of the manufacturing buildings. They had a right to use it to fill their steam boilers and for rental purposes. The water department gives them the right in these buildings and other buildings to use it for boilers, and steam. And there are other manufactories that the water department gives the same right to, for filling steam boilers which are used for the purpose of running engines for power, all of which are owned by private individuals. We have three meters in the city in churches that are used for running organs. \* \* \* Our consumers can use the water for any purpose they want to. Any customer who will take the water and pay for it, we allow to use it in filling boilers for manufactories. \* \* \* We

supply water to private fountains for ornamental use in two or three instances, outside of the land sprinklers, and we supply it for the public parks and get rent for it at certain fixed charges collected by the board."

*Page 50-51 Transcript.*

"The water which is measured by meters amounts to one million gallons a day. We measure the water in all the large establishments, and in all the manufacturing establishments by meters."

*Page 51 Transcript.*

"The water from Lake Phalan supplies a large number of these mechanical purposes, but some of the water that comes from Lake Vadnais supplies some too."

*Page 51 Transcript.*

"Lake Vadnais is the lake into which water that is pumped from Lake Baldwin by our station comes. \* \* \* All of the high service is supplied from Lake Vadnais and some of the low service is supplied from Lake Phalan."

*Page 49 Transcript.*

Plaintiffs claimed in the courts below and still claim, that the character of these uses as thus defined, is in no sense of the word a "public" use, to which the rights of plaintiffs can possibly be made subordinate. Plaintiffs use the water for power, but they have a right to it by reason of their natural situation. To hold that, whether through the instrumentality of the State, or in any other way, that water which naturally flows past their land, and which they need for power, can be taken away from them and transported away from the river for a distance of from ten to fifteen miles, and then sold to other individuals for the use of manufacturing and the running of motors, is to allow a taking of property for "private" use. Those are not

such "public" uses, as can possibly be paramount to the rights of plaintiffs.

It has been held that the public water supply company, cannot even by condemnation acquire a right to divert water of a stream for the purposes of such private uses, even by paying compensation.

*In re Barre Water Co., 62 Vermont 27.*

The State court was, then, wrong when it says in these cases, that all of the uses shown by the record are proper "public" uses, and especially when it holds, that all of those uses are paramount to any rights which plaintiffs have. That holding of the Minnesota Supreme Court, is not binding upon this court. In a case of this kind, this court, in the hearing upon writ of error, will decide as to what are proper "public" and "private" uses. As was said in the case of *Fallbrook Irrigation District vs Bradley*:

"We do not assume that these various statements, constitutional and legislative, together with the decisions of the State court, are conclusive or binding upon this court, upon the question as to what is due process of law, and as incident thereto what is public use. As here presented these are questions which also arise under the Federal Constitution, and we must decide them in accordance with our view of the constitutional law."

*Fallbrook Irrigation District vs Bradley, 164 U. S. 168.*

## 6.

**In view of what has already been shown, the statute of 1885, having the effect, as construed and declared valid by the State Supreme Court of Minnesota, to take away from plaintiffs and to diminish their private property rights, without any provision for compensation, it therefore has the effect to deprive plaintiffs of their private property without due process of law; and this Court upon these writs of error will review the questions involved, and will reverse the judgment of the State Court.**

We have shown that the plaintiffs in error have property right to the use for power of all the water naturally flowing over their dams, which is not subject or subordinate to any paramount right of the State to divert for the purposes of defendant in error, without making compensation.

This property right is one belonging to the plaintiffs in error by the rules of property, beyond the power or jurisdiction of the Courts of Minnesota to disregard, which have been established and settled in each of the following ways:

1. By the law of the land governing those rights as it has always existed, before, at the time, and ever since, the plaintiffs in error became riparian owners upon the river; and by a rule of property which is so general and well established that, even if the Minnesota court had ever attempted to refuse its recognition, such refusal could not affect the rights of the plaintiffs in error; but it is one which the Minnesota courts have never before denied.

*Divisions 1, 2 and 3, Part II of this Brief.*

2. By a rule of property which if, it were to be established alone by the decisions of the Minnesota court, has been clearly and indisputably fixed by these decisions as claimed by the plaintiffs in error.

*Division 4, Part II above.*

That private property should, in no case, be taken or damaged for a public use except in duly authorized proceedings and by making just compensation, is a protection to property which has been guaranteed by every fundamental law of Minnesota and of the territory from which it was formed, as shown by the provisions of those fundamental laws from the earliest to the present times. This is shown by the following:

1. By the ordinance of 1787.
- No. 1 Appendix hereto.*
2. By the Organic Act of Minnesota and the act authorizing a State government.

*Nos. 3 and 4 Appendix hereto.*

3. By the Constitution of the State of Minnesota which provides:

"No person shall \* \* be deprived of life, liberty or property without due process of law."

*Sec. 7, Article I, Constitution of Minnesota.*

*See No. 4 Appendix hereto.*

"Private property shall not be taken for public use without just compensation therefor first paid or secured."

*Sec. 13, Article I, Constitution of Minnesota.*

*See No. 4 Appendix hereto.*

Under these circumstances, the diversion made by defendant under the authority of the act of 1885 deprives plaintiffs in error of their property, without due process of law; and that statute is therefore repugnant to 14th Article of the Amendments to the Federal Constitution.

*Kaukauna Co. vs Green Bay Co., 142 U. S. 254.*

*Yessler vs Washington Harbor Line Coms., 146 U. S. 654.*

*Fallbrook Irrigation District vs Bradley, 164 U. S. 168.*

*Hardin vs Jordan, 140 U. S. 371.*

Under our assignments of error the next point which we make, is that the statute of 1885 has the effect to impair the obligation of contracts.

## III.

EVEN IF IT SHOULD BE HELD, THAT THE PLAINTIFFS IN ERROR HAVE A PROPERTY RIGHT IN THE USE OF ALL THE WATER FOR POWER NATURALLY FLOWING PAST THEIR LANDS, WHICH, SO FAR AS THEIR RIGHTS AS RIPARIAN OWNERS ARE CONCERNED, IS SUBJECT TO BE DIVERTED BY THE STATE FOR THE PURPOSES OF DEFENDANT, WITHOUT COMPENSATION, STILL PLAINTIFFS HAVE, BY VIRTUE OF THEIR CHARTERS, A CONTRACT PROPERTY RIGHT TO THE USE OF ALL THE POWER CREATED BY THEIR DAMS AND BY THE NATURAL FLOW OF THE MISSISSIPPI PAST THEIR LANDS, WHICH IS NOT SUBJECT TO ANY RIGHT OF THE STATE TO DIVERT WITHOUT COMPENSATION; AND THE STATUTE OF 1885, AS CONSTRUED BY THE MINNESOTA SUPREME COURT, HAS THE EFFECT TO DEPRIVE THE PLAINTIFFS OF THAT CONTRACT RIGHT, AND IS THEREFORE REPUGNANT TO SECTION 10 OF ARTICLE I OF THE FEDERAL CONSTITUTION IN THAT IT IMPAIRS THE OBLIGATION OF CONTRACTS.

The charter of the plaintiff in error, the St. Anthony Falls Water Power Company, passed in 1856 provides as follows:

"SEC. 9. The said corporators are hereby authorized for the purpose of the improvement of the water power above and below the Falls of St. Anthony, in the Mississippi River, to maintain the present dams and sluices, and construct and maintain dams, canals, and water sluices, erect mills, buildings, or other structures for the purpose of manufacturing in any of its branches, or improving any water power owned or possessed by said Company in such manner, or to such extent as shall be

authorized by the Directors of said Company, and may construct dams on the rapids above or below the Falls of St. Anthony, with side dams, sluices, and all other improvements in the Mississippi River, upon the property owned or to be owned by said corporators, which may be necessary for the full enjoyment of the powers herein granted; provided however, that said corporation shall give a free passage for all loose logs, that are to be manufactured on Hennepin or Cataract Islands, or between them on the Falls, through any dam or dams they may erect, on the West side of Nicollet or Hennepin Island, and a passage through the pond above said dam, shall when needed be twenty feet wide; provided that nothing herein contained shall be so construed as to authorize said corporation to interfere with the rights or property of any other person or persons whatever."

The charter of the plaintiff in error, the Minneapolis Mill Company, passed in 1856, provides as follows:

"SEC. 9. The said corporators are hereby authorized, for the purpose of the improvement of the water power above and below the Falls of St. Anthony in the Mississippi river, to maintain the present dams and sluices, and to construct dams and canals, and water sluices, erect mills, buildings, or other structures, for the purpose of manufacturing in any of its branches, or improving any water power owned or possessed by said Company in such manner to such extent as shall be authorized by the Directors of said Company, and may construct dams on the rapids above and below the Falls of St. Anthony, with side dams, sluices, and all other improvements in the Mississippi river, which may be necessary for the full enjoyment of the powers herein granted.

"SEC. 11. This act shall take effect and be in force from and after its passage, and may be amended by any subsequent Legislative Assembly, in any manner not destroying or impairing the vested rights of said corporators; provided, that nothing herein contained shall be so construed as to authorize said corporation to interfere with the rights or property of any other person or persons whatever.

"SEC. 12. Provided further, that nothing contained in the act entitled an act to incorporate the St. Anthony Falls Water Power Company shall be so construed as to allow the said St. Anthony Falls Water Power Company, to maintain or con-

struct dams or sluices extending beyond the center of the channel of the Mississippi river from the western bank of Hennepin Island, and said St. Anthony Falls Water Power Company are hereby restricted in the exercise of powers and privileges granted by the ninth section of said act to the space between the western bank of said island and the center of said river; provided the said dams shall always be provided with suitable slides and sluices, so as to admit the passage of logs and timber down the Mississippi river, and that any future Legislature may amend, or modify this act or the act to which this section is amendatory, and provided further that the Minneapolis Mill Company shall be restricted in its operations to the center of the main channel of the Mississippi river and to the property belonging to said Company."

Plaintiffs claim in the first place that the charter of the St. Anthony Falls Water Power Company, containing no provision whatever for amendments, or modification, was never subject to any modification or amendment whatever without the consent of that Company; and accordingly that the attempted provision for an amendment of that charter inserted in the charter of the Minneapolis Mill Company is invalid.

*Smith vs S. A. T. & F. Co., 64 Feb. Rep. 272, and cases there cited.*

Assuming that both charters were subject to amendment or modification, there has never been any amendment which in any way attempts to take away the privileges granted in those charters. They accordingly stand as grants of those privileges, without any attempt at revocation or amendment. The powers granted have been exercised and rights thereby have tested which no statute can take away or diminish.

*Allen vs McKean, 1 Sumner, 276.*

*Miller vs Railway Co., 21 Barbour, 513.*

*Commonwealth vs Essex Co., 79 Mass. 239.*

Although such construction of the provisions of those charters may have been made by the Supreme Court of the

State of Minnesota, that the act of 1885 does not invalidate their provisions, this Court is not bound by that construction. It will examine the question for itself and determine, under the general law of the land applicable to such grants, the force and effect of those provisions.

*Bridge Proprietors vs Hoboken Co.* 1 Wall. 116.

In construing a statute of a State, and a contract right under a State statute, the United States Court will adopt a settled construction existing when the contract in question was made, and reject a more recent decision of the court of the State as not conferring a rule for such a case.

*Piqua State Bank of Iowa vs Knopf*, 16 How., 369

The question, then, of the force and effect of those charters is one which must now be re-examined by this court, and will be decided in accordance with the law applicable to such grants as it existed at the time the grants were made.

Referring, first, to what has been said by the Supreme Court of the State of Minnesota as to the effect of those provisions of the charter, all that has been said by the Supreme Court as to those provisions, is contained in the decision in the case of *Morrill vs St. Anthony Falls Water Power Company*, and the case of the *State vs The Minneapolis Mill Company*, which are set out in Sub-division 4 of part I of this brief above.

The purport of these decisions is, that all the rights to the use of the water in the Mississippi river which are here claimed by plaintiffs, belong to them by virtue of their riparian ownership; and that therefore the charters do not give any special privilege or grant, but is only a statement of general authority included in the act of incorporation.

But in this part of our argument, which relates to the

obligation of contracts, we are assuming (for the purpose of argument only) that the plaintiffs did not get the rights which they claim by virtue of their position as riparian owners. This is eliminating the assumption and the very reason upon which these holdings of the State court as to the force of the provisions of these charters were made. Consequently the force of those decisions at this time, is nothing.

To get at the question which is here open to discussion, we must assume that the plaintiffs did not get the riparian rights they claim, by virtue of their riparian position, and that they did not have those rights by virtue of that position at the time these charters were passed, nor at the time immediately following when they entered upon the river and made the improvements which they have maintained ever since.

Under circumstances thus necessarily assumed, those provisions in the charters must have had a significant force and effect. They could not be held to be merely statements of general authority to do just the things that the riparian owners would have a right to do. They became and were special grants and privileges, which, when acted upon, were irrevocable by the state; and which gave to plaintiffs a special vested private property right in and to the use of the power which was created by all the water naturally flowing past their lands over the dams which they were authorized to construct. It should be noticed, too, that this very decision in question, holds that the plaintiffs, by their charters, were authorized to build and maintain dams in the Mississippi River at the Falls of St. Anthony about ten miles above St. Paul, for the development of water power and for the use and sale of such power.

*See decision page 77, Transcript of Record and No. "9," Appendix hereto.*

These territorial statutes, by the provisions of the Constitution of the State of Minnesota, and its admission as a State to the Union, became binding contracts upon the state of Minnesota.

The State Constitution provides:

"That no inconvenience may arise by reason of a change from the territorial to a permanent state government, it is declared that all the rights, actions, prosecutions, judgments, claims and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place. \* \* \*

"All laws now in force in the Territory of Minnesota, not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the Legislature."

*See quotations from Minnesota Constitution No. "4" in Appendix hereto.*

The record here shows that immediately upon the passage of these charters, the plaintiffs entered upon the construction and maintenance of the improvements, which were provided for in these charters, in order to make the power which they were authorized to develop and control available; and that from the year 1856 up to the present time, they have so remained in ownership and possession.

*Transcript of Record, page 26.*

This constituted the acceptance of the grants conferred by those charters, which have never been attempted to be revoked, amended, modified or repealed in any way by the State of Minnesota. More than that, when so acted upon and accepted, they became irrevocable whether the grants be construed as a mere license or as absolute grants.

When so acted upon they invested the plaintiffs with a property right, guaranteed to them by the force of their charters, which is in the nature of a contract. And none of those rights, privileges or property thus acquired and possessed, could be taken from them arbitrarily by the State. Any statute which so attempts to lessen or diminish the rights granted and acquired by the plaintiffs, is one which impairs the obligation of the contract rights guaranteed to plaintiffs by their charters.

*Monongahela Nav. Co. vs U. S. 148, U. S. 312-324.*

*Bridge Proprietors vs Hoboken Co., 1 Wall. 116.*

In conclusion, then, on this point, the plaintiffs did acquire and have held since 1856, a contract right to the full enjoyment and use of all the power created over their dams by the natural flow of water in the Mississippi river opposite their lands. The effect of the statute of 1885, as construed by the Minnesota Supreme Court, is to impair the obligation of that contract right. It is therefore repugnant to Section 10 of Article 1, of the Federal Constitution.

**IV.****CONCLUSION.**

In conclusion, we maintain that it has been shown, that the Statute of 1885, as construed by the Minnesota Supreme Court, has the effect of depriving plaintiffs of their private property without due process of law; and that further it has the effect of impairing the contract obligation and right invested in plaintiffs by virtue of their charters.

In the argument in the Supreme Court of Minnesota, after protesting that to deny our claim was, not only to take away private property of plaintiffs without due process of law, by taking it without just compensation, but also to impair the obligation of contracts, in contravention of both the State Constitution and of the Constitution of the United States, we called attention in that court to the following considerations, which we repeat here:

Although there were many minor errors at the trial, the disposition made of these cases, leaves the one question first above discussed (that the diversion proposed is repugnant to the State and Federal Constitutions), as the central and most prominent one on this appeal. To sustain the decision of the lower court is, we believe, to institute a new and revolutionary doctrine in regard to property rights in this State; and this too, at the very time when the highest court in our land is warning the judiciary against "illegitimate and unconstitutional practices" which "get their first footing by silent approaches and slight devia-

tions from legal modes of procedure." (Monongahela case, 148 U. S. 321, quoting Justice Bradley in the case of *Boyd vs U. S.* 116 U. S. 616). It might be an easy matter by just such steps as would be laid by the decision in the court below, stealthily to encroach upon the property rights of citizens on the pretext of defending the rights of the people at large; with the result that the security insured to every property owner and wage earner vanishes at the same time with the disappearance of those legal principles in regard to property rights which have heretofore prevailed, and which the constitutional provisions of the State and of the United States have been made to protect.

The fresh water rivers of America, and especially in this part of the United States, furnish a natural and very valuable means of power for the establishment of manufacturing towns and cities. Indeed, at these very Falls of St. Anthony, the water power has built up and maintained a populous and thriving community, and has established the greatest center of flour manufacturing in the world, all of which, in a country where fuel is scarce and expensive and where competition with manufacturing establishments situated near the eastern fuel supplies is exceedingly difficult, could never have been done without this water power. There is no one use, unless it be that of navigation, to which nature has intended these rivers to be put so much as that of obtaining water power. On the strength of these advantages offered by nature, and the recognized principles of riparian rights, expensive mill structures and improvements have been constructed and maintained for years, and money has been invested for the purpose of utilizing the most economical method for obtaining power. If ten million gallons a day can be pumped away in one instance to be sold

to private individuals, who live several miles away from the point of diversion, for purposes not only public, but private, without making compensation to the riparian owners, legally entitled to the use of the water in its natural channel,—there can be no limit fixed to the extent to which the diversion of natural streams shall be carried, to the damage of the rights of riparian owners.

We respectfully submit, that the contention of plaintiffs in error in these cases should be sustained, and that this court should reverse the judgments of the State court in these two cases.

ROME G. BROWN, and  
Charles S. Albert, Attorneys for Plaintiffs in Error.

## APPENDIX.

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Containing quotations referred to in the within  
brief, from the following:

1. Ordinance of 1787.
2. Organic Act of Minnesota.
3. Act Authorizing State Government.
4. Constitution of Minnesota.
5. Act of Admission to Union.
6. Charter of St. Anthony Falls Water Power Co.
7. Charter of Minneapolis Mill Company.
8. Act of 1885, Charter of Defendant in Error.
9. Opinion and Syllabus of Supreme Court of  
Minnesota in Cases at Bar.

## 1.

**AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO.****ARTICLE II.**

No man shall be deprived of his liberty or property, but by judgment of his peers, or the law of the land, and should the public exigencies make it necessary for the common preservation to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, bona fide, and without fraud previously formed.

**ARTICLE IV.**

The said territory, and the states which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the federal debts, contracted or to be contracted, and a proportional part of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures

of the district or districts, or new states, within the time agreed upon by the United States in Congress assembled. The legislatures of these districts, or new states, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, duty or impost therefor.

*General Statutes Minnesota, 1894, p. XLVIII.*

2.

### **ORGANIC ACT OF MINNESOTA.**

#### **SEC. 6. EXTENT OF THE LEGISLATIVE POWER.**

And be it further enacted; That the legislative power of the territory extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws passed by the legislative assembly and governor shall be submitted to the congress of the United States, and, if disapproved, shall be null and of no effect.

**SECTION. 12. INHABITANTS TO BE ENTITLED TO ALL THE RIGHTS OF INHABITANTS OF WISCONSIN—LAWS OF WISCONSIN TO CONTINUE IN FORCE.**

And be it further enacted: That the inhabitants of the said territory shall be entitled to all the rights, privileges and immunities heretofore granted and secured to the territory of Wisconsin and to its inhabitants; and the laws in force in the territory of Wisconsin at the date of admission of the state of Wisconsin shall continue to be valid and operative therein, so far as the same shall not be incompatible with the provisions of this act, subject, nevertheless, to be altered, modified, or repealed by the governor and legislative assembly of the said territory of Minnesota; and the laws of the United States are hereby extended over and declared to be in force in said territory, so far as the same, or any provision thereof, may be applicable.

**SEC. 20. HOW LAWS SHALL BE ENACTED BY THE ASSEMBLY AND APPROVED BY THE GOVERNOR.**

And be it further enacted: That every bill which shall or may pass the council and house of representatives, shall, before it becomes a law, be presented to the governor of the territory; if he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated; which shall cause the objections to be entered at large upon their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall also be reconsidered, and if approved by two-thirds of that house, it shall become a law; but in any such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered in the journal of each house respectively. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been pre-

sented to him, the same shall become a law in like manner as if he had signed it, unless the legislative assembly, by adjournment, prevent it; in which case it shall not become a law.

*General Statutes Minnesota, 1894, p. LI.*

### 3.

#### **ACT AUTHORIZING A STATE GOVERNMENT.**

**SECTION 1. INHABITANTS OF PART OF MINNESTOA AUTHORIZED TO FORM A CONSTITUTION AND STATE GOVERNMENT.**

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That the inhabitants be, and are they hereby authorized to form for themselves a constitution and state government, by the name of the state of Minnesota, and to come into the Union on an equal footing with the original states, according to the federal constitution.

**SEC. 2. JURISDICTION OVER BORDERING WATERS WHICH ARE DECLARED TO BE COMMON HIGHWAYS.**

And be it further enacted, That the state of Minnesota shall have concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on the said state of Minnesota, so far as the same shall form a common boundary to said state, and said river or waters leading into the same shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor.

*General Statutes Minnesota, 1894, p. LIX.*

## 4.

**CONSTITUTION OF THE STATE OF MINNESOTA.****ARTICLE I.**

**SEC. 2.** No person of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.

**SEC. 7.** No person shall be \* \* \* deprived of life, liberty or property without due process of law.

**SEC. 11.** No bill of attainder, ex post facto law, or any law impairing the obligation of contracts shall ever be passed.

**SECTION 13. PRIVATE PROPERTY SHALL NOT BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION THEREFOR, FIRST PAID OR ~~RECEIVED~~ SECURED.**

**SEC. 16. FREEDOM OF RELIGIOUS BELIEF.**

The enumeration of rights in this constitution shall not be construed to deny or impair others retained by and inherent in the people.

**ARTICLE II.**

**SEC. 2. JURISDICTION ON RIVERS.**

The State of Minnesota shall have concurrent jurisdiction on the Mississippi, and all other rivers and waters bordering on the said State of Minnesota, so far as the same shall form a common boundary to said State (and any other state or states now or hereafter to be formed by the same); and said rivers and waters (and navigable waters) leading into the same, shall be common highways, and forever free, as well to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost or toll therefor.

**SEC. 3. ACCEPTANCE OF THE PROPOSITIONS CONTAINED IN THE ENABLING ACT.**

The proposition contained in the act of congress entitled "An act to authorize the people of the territory of Minnesota to form a constitution and state government preparatory to their admission into the Union on an equal footing with the original states," are hereby accepted, ratified and confirmed, and shall remain irrevocable without the consent of the United States; and it is hereby ordered that this state shall never interfere with the primary disposal of the soil within the same, by the United States, or with any regulations congress may find necessary for securing the title to said soil to bona fide purchasers thereof; and no tax shall be imposed on lands belonging to the United States, and in no case shall non-resident proprietors be taxed any higher than residents.

**ARTICLE X.****SEC. 4. LANDS TAKEN FOR PUBLIC WAY.**

Lands may be taken for public way, for the purpose of granting to any corporation the franchise of way for public use. In all cases, however, a fair and equitable compensation shall be paid for such land, and the damage arising from the taking of the same; but all corporations being common carriers, enjoying the right of way in pursuance of the provisions of this section, shall be bound to carry the mineral, agricultural and other productions or manufactures on equal and reasonable terms.

**ARTICLE XV.****SCHEDULE.****SEC. 1. RIGHTS UNDER TERRITORIAL LAWS SAVED.**

That no inconvenience may arise by reason of a change from a territorial to a permanent state government, it is declared that all the rights, actions, prosecutions, judgments, claims

and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place; and all process which may be issued under the authority of the territory of Minnesota previous to its admission into the Union of the United States, shall be as valid as if issued in the name of the State.

#### SEC. 2. TERRITORIAL LAWS CONTINUED.

All laws now in force in the territory of Minnesota not repugnant to this constitution, shall remain in force until they expire by their own limitations, or be altered or repealed by the legislature.

#### SEC. 4. STATE TO SUCCEED TO ALL RIGHTS OF TERRITORY.

All recognizances heretofore taken, or which may be taken before the change from a territorial to a permanent state government, shall remain valid, and shall pass to and be prosecuted in the name of the State; and all bonds executed to the governor of the territory, or to any other officer or court in his or their official capacity, shall pass to the governor or state authority, and their successors in office, for the uses therein respectively expressed, and may be sued for and recovered accordingly; and all the estate of property, real, personal or mixed, and all judgments, bonds, specialties, choses in action, and claims and debts of whatsoever description, of the territory of Minnesota, shall inure to and vest in the State of Minnesota, and may be sued for and recovered in the same manner and to the same extent by the State of Minnesota, as the same could have been by the territory of Minnesota. All criminal prosecutions and penal actions which may have arisen or which may arise before the change from a territorial to a state government, and which shall then be pending, shall be prosecuted to judgment and execution in the name of the State. All offences committed against the laws of the territory of Minnesota before the change from a territorial to a state government, and which shall not be prosecuted before such change, may be prosecuted

in the name and by the authority of the State of Minnesota, with like effect as though such change had not taken place, and all penalties incurred shall remain the same as if the constitution had not been adopted. All actions at law and suits in equity which may be pending in any of the courts of the territory of Minnesota at the time of a change from a territorial to a state government, may be continued and transferred to any court of the state which shall have jurisdiction of the subject-matter thereof.

*General Statutes Minnesota, 1894, p. LXI.*

5.

**ACT OF ADMISSION INTO THE UNION.**

SEC. 3. LAWS OF THE UNITED STATES EXTENDED OVER IT  
—MADE A JUDICIAL DISTRICT ETC.

And be it further enacted: That from and after the admission of the state of Minnesota, as hereinbefore provided, all the laws of the United States which are not locally inapplicable shall have the same force and effect within that state as in other states of the Union.

*Page CXII, Minnesota General Statutes, 1894.*

## 6.

**CHARTER OF THE ST. ANTHONY FALLS WATER  
POWER COMPANY.**

**AN ACT ENTITLED AN ACT TO INCORPORATE THE ST.  
ANTHONY FALLS WATER POWER COMPANY.**

**SECTION 1.** 1. Names of corporators; created body corporate.  
 2. Officers, of what to consist.  
 3. Term of office; first meeting, by whom and when called.  
 4. Not to dissolve corporation, if election is not held.  
 5. Elect agents; execute power of attorney.  
 6. Amount of capital stock.  
 7. Relative to taxation.  
 8. Stockholders personally liable for debts of company.  
 9. Construct and maintain dams.  
 10. Acts inconsistent repealed.  
 11. When to take effect.

*Be it enacted by the Legislative Assembly of the Territory of Minnesota:*

**SECTION 1.** That Franklin Steele, Thomas E. Davis, John F. A. Sanford, Fred'k C. Gebhard, Richard Chute and John S. Prince, their associates, successors and assigns, are hereby created a body corporate, with perpetual succession under the name and style of the Saint Anthony Falls Water Power Company, and by that name and style, shall be, and are hereby made capable in law, to have, purchase, receive, possess, sell, convey, and enjoy, real and personal estate and retain to them their successors and assigns, all such real and personal estate, to sue and be sued, plead and be impleaded, answer and answered unto, defend and be defended in courts of record and elsewhere, and to do any and all acts that the members thereof might or could lawfully do as individuals, and shall have and enjoy all proper remedies at law and equity to secure and protect them in the exercise and use of the rights and privileges, and in the performance of the duties herein

granted and enjoined, and to prevent all invasion thereof, or interruption in exercising and performing the same, to make such by-laws as they may deem proper, and also to have, make and use a common seal, and to alter, renew or change the same at pleasure.

SEC. 2. The officers of said Company shall be a President, Treasurer, three Directors, and a Secretary, whose duties shall be prescribed by the by-laws of said Company; but the said Company may increase the number of Directors at any time by a majority vote of the stock of said Company.

SEC. 3. The term of office of each of the officers of said Company shall be one year, and until their successors in office shall be elected and qualified. That Franklin Steele shall call the first meeting of said corporators, by giving personal written notice to each of said corporators, designating therein the time and place of holding the same, at which time and place he shall call said meeting to order, and be President pro tempore thereof. The said meeting shall then proceed to ballot for President thereof, who when elected shall be President of said meeting, and also first President of said Company; after which the said meeting shall proceed to elect a Secretary of said Company, who shall be Secretary of said meeting and also the first Secretary of said Company; the said meeting shall then proceed to elect three Directors and a Treasurer of said Company, after which the said Company shall be deemed to be organized for the purpose of transacting business. The first officers of said Company shall be elected by a majority vote of the corporators present, and after said first meeting the elections of all officers of said Company, and all business requiring the votes of said Company, shall be made by a majority of the shares of the capital stock of the same, such stockholder having the right either in person or by proxy to cast as many votes as he may own shares of the capital stock therein.

SEC. 4. If an election of officers shall not be made on the day specified in the by-laws for that purpose, said corporation shall not for that cause be dissolved, but such election may be

made on any other day, in such manner as shall be prescribed by the by-laws of said corporation.

SEC. 5. When said Company is organized as aforesaid, at any annual or special meeting thereof, the said Company may by a vote of a majority of the stockholders, voting by shares as aforesaid, elect for a term of one or more years an agent or agents for the transaction of the business of said Company, who shall reside within this Territory, and have such power and authority to transact the business of said Company, as the said Company by vote as aforesaid, shall delegate and authorize; and no agent elected as aforesaid, shall enter upon the duties of his office, or transact any business in behalf of or for the said Company, until the President and Directors thereof, shall make and execute a power of attorney in due form, and acknowledge the same before an officer empowered to take acknowledgments of deeds within this Territory, which power of attorney shall clearly and specifically set forth what business and to what extent the said agent or agents are authorized to transact in behalf of said Company, unless the power of attorney as aforesaid be general, in which case the said Company shall be bound by the acts of said agent to whatever extent the said agent assumes to act, and the said power of attorney shall be recorded in all counties within this Territory where said Company hold real estate; and all of the acts of said agent in any matter relating to conveyances of real estate shall be signed by the agent, as the agent of the Saint Anthony Falls Water Power Company, and be acknowledged by him as the act of said Company, and be sealed by the common seal of the same.

SEC. 6. The capital stock of said Company shall be one hundred and sixty thousand dollars, and be divided into shares of one hundred dollars each, and in lieu of the capital stock being paid in money, the said corporators may convey to said Company, all real and personal estate and property owned jointly by them, and when so conveyed the said real and personal estate and property shall be held by said Company as the capital stock thereof, and each corporator shall own of the

whole capital stock in the same proportion and ratio as he owned of the property constituting the same, which shall be apportioned as the said corporators may agree.

SEC. 7. The stock of said Company shall not be liable to taxation against the individual stockholders or the Company, but the property constituting said capital stock shall be taxed against the corporation in the same manner as other property in this Territory.

SEC. 8. Each of the stockholders of said Company shall be personally liable for the debts of said Company, to an amount equal to the amount of the capital stock held by said stockholder, and no more, and the said Company may by a majority vote, voting by shares as aforesaid, increase the said capital stock, at any annual or special meeting of said Company, regularly called according to the by-laws of said Company.

SEC. 9. The said corporators are hereby authorized for the purpose of the improvement of the water power above and below the Falls of Saint Anthony, in the Mississippi river, to maintain the present dams and sluices, and construct and maintain dams, canals, and water sluices, erect mills, buildings, or other structures for the purpose of manufacturing in any of its branches, or improving any water power owned or possessed by said Company, in such manner or to such extent as shall be authorized by the Directors of said Company, and may construct dams on the rapids above or below the Falls of Saint Anthony, with side dams, sluices, and all other improvements in the Mississippi River, upon the property owned or to be owned by said corporators, which may be necessary for the full enjoyment of the powers herein granted; Provided, however, that said corporation shall give a free passage for all loose logs that are to be manufactured on Hennepin or Cataract Islands, or between them on the Falls through any dam or dams they may erect, on the west side of Nicollet or Hennepin Islands, and the passage through the pond, above said dam, shall when needed, be twenty feet wide; Provided, that noth-

ing herein contained shall be so construed as to authorize said corporation to interfere with the rights or property of any other person or persons whatever.

SEC. 10. All acts or parts of acts inconsistent with this act are hereby repealed.

SEC. 11. This act shall take effect and be in force from and after its passage.

CHARLES GARDNER,  
Speaker of the House of Representatives.

JOHN B. BRISBIN,  
President of the Council.

Approved—February twenty-sixth, one thousand eight hundred and fifty-six.

W. A. GORMAN.

I certify the foregoing to be a correct copy of the original bill on file in this office.

J. TRAVIS ROSSER,  
Secretary of Minnesota Territory.

*Page 215, Laws of Minnesota, 1856.*

## 7.

**CHARTER OF THE MINNEAPOLIS MILL COMPANY.****AN ACT ENTITLED AN ACT TO INCORPORATE THE MINNEAPOLIS MILL COMPANY.**

**SECTION I.** Names of corporators; created body corporate.  
 2. Officers, of what to consist.  
 3. Term of office; first meeting, by whom called and when held.  
 4. Corporation; not to be dissolved, if election is not held.  
 5. Elect agents; execute power of attorney.  
 6. Amount of capital stock.  
 7. Relative to taxation.  
 8. Stockholders personally liable for debts; increase capital stock.  
 9. Authorized to construct dams, etc.  
 10. Acts inconsistent repealed.  
 11. When to take effect; Legislature may amend.  
 12. Dams not to extend beyond center of channels.

*Be it enacted by the Legislative Assembly of the Territory of Minnesota:*

**SECTION I.** That Roswell P. Russell, M. L. Olds, George E. Huy, Jacob Elliott, Robert H. Smith and Dorilus Morrison, their associates, successors and assigns, are hereby created a body corporate, with perpetual succession under the name and style of the Minneapolis Mill Company, and by that name and style shall be, and are hereby made capable in law to, have, purchase, receive, possess, sell, convey and enjoy real and personal estate, and retain to them, their successors and assigns all such lands, tenements, and hereditaments, to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended in courts of record and elsewhere, and to do any and all acts that the members thereof might or could lawfully do as individuals, and shall have and enjoy all proper remedies at law and equity, to secure and protect them in the exercise and use of the rights and privileges, and in the per-

formance of the duties herein granted and enjoined, and to prevent all invasion thereof, or interruption in exercising and performing the same, to make such by-laws as they may deem proper, and also to have, make and use a common seal, and alter, renew, or change the same at pleasure.

SEC. 2. The officers of said Company shall be a President, Treasurer, three Directors, and a Secretary, whose duties shall be prescribed by the by-laws of said Company, but the said company may increase the number of Directors at any time by a majority vote of the stock of said Company.

SEC. 3. The term of office of each of the officers of said Company shall be one year, and until their successors in office shall be elected and qualified. That Roswell P. Russell shall call the first meeting of said corporators, by giving personal written notice to each of said corporators, designating therein the time and place of holding the same, at which time and place he shall call said meeting to order, and be President pro tempore thereof. The said meeting shall then proceed to ballot for President thereof, who, when elected shall be President of said meeting, and also first President of said Company; after which the said meeting shall proceed to elect a Secretary of said Company, who shall be Secretary of said meeting, and also the first Secretary of said Company; the said meeting shall then proceed to elect three Directors and a Treasurer of said Company, after which said Company shall be deemed to be organized for the purpose of transacting business. The first officers of said Company shall be selected by a majority vote of the corporators present, and after said first meeting, the elections of all officers of said Company, and all business requiring the votes of said Company, shall be made by a majority of the shares of the capital stock of the same, each stockholder having the right either in person or by proxy to cast as many votes as he may own shares of the capital stock therein.

SEC. 4. If an election of officers shall not be made on the day specified in the by-laws for that purpose, said corporation shall not for that cause, be dissolved but such election may be

made on any other day, in such manner as shall be prescribed by the by-laws of said corporation.

SEC. 5. When said Company is organized as aforesaid, at any annual or special meeting thereof, the said company may by vote of a majority of the stockholders, voting by shares, as aforesaid, elect for a term of one or more years, an agent or agents for the transaction of the business of said Company, who shall reside within this Territory, and have such power and authority to transact the business of said company, as the said company by vote as aforesaid, shall delegate and authorize; and no agent elected as aforesaid shall enter upon the duties of his office, or transact any business in behalf of or for said Company, until the President and Directors thereof, shall make and execute a power of attorney in due form and acknowledge the same before any officer empowered to take acknowledgments of deeds within this Territory, which Power of Attorney shall clearly and specifically set forth what business, and to what extent the said agent or agents are authorized to transact in behalf of said Company, unless the powers of attorney as aforesaid be general, in which case the said Company shall be bound by the acts of said agent to whatever extent the said agent assumes to act, and shall be recorded in all counties within this Territory where said Company hold real estate; and all of the acts of said agent in any matter relating to conveyances of real estate shall be signed by the agent as the agent of the Minneapolis Mill Company, and be acknowledged by him as the act of said company, and be sealed by the common seal of the same.

SEC. 6. The capital stock of said Company shall be one hundred and sixty thousand dollars, and be divided into shares of one hundred dollars each, and in lieu of the capital stock being paid in money, the said corporators may convey to said Company, all the real and personal estate and property owned jointly by them, and when so conveyed, the said real and personal estate and property shall be held by said Company as the capital stock thereof, and each corporator shall own of the

whole capital stock in the same proportion and ratio as he owned of the property constituting the same, which shall be apportioned as the said corporators may agree.

SEC. 7. The stock of said Company shall not be liable to taxation against the individual stockholders of the Company, but the property constituting said capital stock shall be taxed against the corporation in the same manner as other property in this territory.

SEC. 8. Each of the stockholders of said Company shall be personally liable for the debts of said Company to an amount equal to the amount of the capital stock held by each stockholder, and no more, and the said Company may by a majority vote, voting by shares as aforesaid, increase the said capital stock, at any annual or special meeting of said Company, regularly called according to the by-laws of said Company.

SEC. 9. The said corporators are hereby authorized, for the purpose of the improvement of the water power above and below the Falls of St. Anthony in the Mississippi river to maintain the present dams and sluices, and to construct dams, canals and water sluices, erect mills, buildings, or other structures for the purpose of manufacturing in any of its branches, or improving any water power owned or possessed by said Company in such manner to such extent as shall be authorized by the Directors of said Company, and may construct dams on the rapids above or below the Falls of St. Anthony, with side dams, sluices, and all other improvements in the Mississippi river which may be necessary for the full employment of the powers therein granted.

SEC. 10. All acts and parts of acts, inconsistent with this act, are hereby repealed.

SEC. 11. This act shall take effect and be in force from and after its passage, and may be amended by any subsequent Legislative Assembly, in any manner not destroying or impairing the vested rights of said corporators: Provided, that nothing herein contained shall be so construed as to authorize said

corporation to interfere with the rights or property of any other person or persons whatever.

SEC. 12. Provided further, that nothing contained in the act entitled an act to incorporate the St. Anthony Falls Water Power Company shall be so construed as to allow the said St. Anthony Falls Water Power Company, to maintain or construct dams or sluices extending beyond the center of the channel of the Mississippi river from the western bank of Hennepin Island, and said St. Anthony Falls Water Power Company are hereby restricted in the exercise of powers and privileges granted by the ninth section of said act to the space between the western bank of said island and the center of said river; Provided, the said dam shall always be provided with suitable slides and sluices, so as to admit the passage of logs and timber down the Mississippi river, and that any future Legislature may amend or modify this act, or the act to which this section is amendatory, and provided further, that the Minneapolis Mill Company shall be restricted in its operations to the center of the main channel of the Mississippi river and to the property belonging to said Company.

CHARLES GARDNER,  
Speaker of the House of Representatives.  
JOHN B. BRISBIN,  
President of the Council.

Approved—February twenty-seventh, one thousand eight hundred and fifty-six.

W. A. GORMAN.

I hereby certify the foregoing to be a correct copy of the original bill on file in this office.

S. TRAVIS ROSSER,  
Secretary of Minnesota Territory.

*Page 236, Laws of Minnesota, 1856.*

**CHAPTER 110, LAWS 1885.**

**AN ACT TO AMEND AND CONSOLIDATE AN ACT TO AUTHORIZE THE CITY OF ST. PAUL TO PURCHASE THE FRANCHISES AND PROPERTY OF THE ST. PAUL WATER COMPANY AND CREATING THE BOARD OF WATER COMMISSIONERS, APPROVED FEBRUARY TEN (10), ONE THOUSAND EIGHT HUNDRED AND EIGHTY ONE (1881), AND THE ACT AMENDATORY THEREOF, APPROVED THE TWENTY-FIFTH (25TH) DAY OF JANUARY, ONE THOUSAND EIGHT HUNDRED AND EIGHTY THREE (1883).**

Be it enacted by the Legislature of the State of Minnesota:

**SECTION 1.** The act entitled "An act to authorize the city of St. Paul to purchase the franchises and property of the St. Paul Water company," and creating the board of water commissioners, approved February ten (10), one thousand eight hundred and eighty-one (1881), and the act amendatory thereof, approved the twenty-fifth (25th) day of January, one thousand eight hundred and eighty-three (1883), are hereby amended and consolidated so that the same shall constitute one act and read as follows:

**SEC. 2.** Whereas, by an act of the legislature of Minnesota, entitled "An act to incorporate the St. Paul Water Company," approved May twenty-six (26), one thousand eight hundred and fifty seven (1857), and sundry acts supplementary thereto, and amendatory thereof, the said company have full power and authority given it to introduce water into the city of St. Paul from any place or places situate in the county of Ramsey, and to lay water pipes in and through the streets, avenues, lands and squares thereof, and to have full and exclusive right to lay pipes for conducting water into any of the

streets, avenues, lanes, alleys and squares of said city, and to adopt any other necessary means to furnish water to any inhabitants of said city, and by virtue of the several acts aforesaid; and, whereas, the great increase of the business and population of the city of St. Paul, and the inadequacy of the supply of water now furnished by said company to answer the wants of the said city have rendered it expedient that the duty of supplying the said city with pure and wholesome water for all purposes should be undertaken and carried forward as in this act provided, and that the property, rights and franchises of the said St. Paul Water company should be purchased from said company by said city, if the same can be accomplished by the payment of a fair and just compensation. Now, therefore, it is hereby made the duty of the judges of the district court of the second (2d) judicial district, or a majority thereof, whenever requested by the common council of the city of St. Paul, to appoint five (5) competent persons, without regard to their residence, one of whom shall be a practical civil engineer, and familiar with erection and maintenance of water works, whose duty it shall be, after taking an oath to faithfully and honestly discharge the duties of said appointment, to inquire into and report as to the efficiency of the general plan adopted by said water company to supply the city with water; what plan or system they would recommend so as to furnish an adequate supply of water to all parts of the city, and the cost thereof; the propriety of the purchase of the St. Paul Water Company's property and franchises by the city of St. Paul, and such other facts as the common council of the city may order and direct, and for which services the said persons, appointed as aforesaid, shall be entitled to such reasonable compensation as the common council may order and direct. \* \* \*

SEC. 4. That all authority under this act shall be exercised by a board of commissioners, to be known and designated as the board of water commissioners, to be appointed as herein designated. \* \* \*

SEC. 5. Said board of water commissioners may sue and be sued, plead and be impleaded, answer and be answered unto, appear and prosecute unto final judgment in any court or elsewhere in the name of said board of water commissioners, have a common seal and the same alter at pleasure. They may employ all proper engineers, surveyors, clerks, or other agents or assistants necessary or convenient for accomplishing the purposes contemplated by this act, and may enter upon any land or water for the purpose of making surveys and examinations for the same. They may prosecute any action in the name of said board of water commissioners against any person or persons for money due for the use of water, or the breach of any contract, express or implied, touching the execution or management of the works or distribution of the water, or of any promise or contract made to or for them; and also for any injury or trespass or nuisance done or caused or procured to be done to the water courses, pipes, machinery, or any other apparatus belonging to or connected with any part of the works, or for any improper use or waste of the water; and said board shall have full power and authority to take and convey from the sources of supply now used by the St. Paul Water Company or which they are empowered to use, and from any other source sufficient to supply the city of St. Paul with pure and wholesome water for all purposes, and for the purposes aforesaid, in all things to exercise all the necessary rights, powers and franchises of the said St. Paul Water Company to be conveyed as aforesaid to the said city of St. Paul.

SEC. 6. That the said board of water commissioners may from time to time for the purpose of furnishing a full supply of water to the inhabitants of the city of St. Paul, extend said water works or make new lines of works, and as it shall from time to time so extend its said works or make new lines of works, it may draw water from any lake or creek by means of pipes, ditches, drains, conduits, aqueducts, or other means of conducting water so as to connect said lakes or creeks with its said works and may erect and construct dams, bulk-heads,

gates, and other needed structures and means for controlling of water and its protection, and in general to do any other act necessary or convenient for accomplishing the purposes contemplated by this act.

SEC. 7. Whenever at any time said board shall propose to extend its said works so as to connect with any of said lakes or creeks, or to divert the water of any stream, creek, or body of water, it shall proceed as follows: Said board shall cause to be made a survey of the line along which it shall so propose to extend its said works and of all lands or other property to be affected by flowage, drainage or otherwise, and for that purpose it may, by its officers and agents, enter upon any lands doing no unnecessary damage thereto. After such survey shall have been made and such line located, it shall cause to be made a map showing the location of said line and the lands necessary to be taken for such extension, and of lands or other property to be affected by flowage, drainage or otherwise. Said map shall be acknowledged by the surveyor making the same and by the president of the board of water commissioners, and shall be filed as a record in the office of the register of deeds of the proper county. And after making compensation as hereinafter provided to the owners of or persons interested in the lands so to be taken, and for damages by reason of diverting the water of any stream, creek or body of water, said city shall have an easement in said land designated on said map for all the purposes contemplated in this act, which said easement shall include the right of passage without doing unreasonable damage from any public highway to and from the land included or covered by said easement. The damage for said right of passage shall be estimated in apportioning the amount of damage to be paid for such easement. \* \* \*

SEC. 11. The owner or owners of any such land or lands may maintain a suit for the recovery of the possession of lands used by the board of water commissioners, for the value thereof, and the damage thereto by reason of the taking thereof as aforesaid, either by flowage, drainage or otherwise, or damage of any kind.

SEC. 12. The defendant, the board of water commissioners, may by answer admit and allege the taking of the plaintiff's land for the use of the board of water commissioners, for the purposes of introducing water into the city of St. Paul, and that no compensation has been paid therefor, and that the defendant is ready and willing to pay such compensation upon having the same assessed by the jury trying the action, provided the plaintiff on trial shall establish his right to recover the land in question.

SEC. 13. In all such actions where the defendant by answer admits and pleads, as hereinabove specified, the jury shall try, and by their verdict find whenever the plaintiff is entitled to recover for the land in controversy, and if so entitled, the amount of compensation to which the plaintiff is entitled for the taking and perpetual use of this land for the purposes herein specified; *Provided*, That when it appears that the land was so taken or appropriated, by and with the consent and acquiescence of the owner, such owner shall not be entitled to recover any rents or profits which accrued prior to the demand for compensation for such land, and he shall be limited to recovery in such case to compensation for the land taken and damages. \* \* \*

SEC. 23. That said board shall regulate the distribution and use of the water in all places, and for all purposes where the same shall be required for either public or private use, and fix the price and rates therefor; *Provided, however*, That in the case of fire hydrants for the extinguishment of fires, and public fountains and watering places, the board shall fix and locate the same as the common council of said city may direct. On the line of constructed works, where practicable, said board shall, from time to time, cause to be assessed the water rate to be paid by the owner or occupant of any house or other building having or using water, on the basis and for the purposes in this act specified, and such water rates shall become a continuing lien until paid, upon such house or other building, and upon the lot or lots upon which such house or other building

is situated. The said city of St. Paul shall pay out of the general fund of said city and place, to the account of said board at the price and rates so fixed by said board for all water furnished and supplied to said city for public fire hydrants for the extinguishment of fires, for water used at public fountains and watering places, for water furnished and supplied to any of the boards or departments of said city, as the same are or may be hereafter established, and all other water supplied to or used or consumed by said city. The said board shall keep separate accounts with each of said boards and departments of all water furnished and consumed by each of said respective boards and departments. And said board is hereby authorized and required to restrain and prevent any and all wastage of water, and to that end may, when in its judgment necessary, turn off the water or take such other action as in its judgment may be proper.

SEC. 24. In case of damage to the pipes or works of the water board, caused by a change of grade or operation of any department of the city, such damage shall be paid out of the general fund of said city, except in cases where an assessment shall be made by the board of public works of said city for a change of grade as now or as may be hereafter provided by law. In such case the damage occurring to the board of water commissioners shall be paid out of such assessment.

SEC. 25. That the said board shall have full power and authority to require payment in advance for the use of water furnished by them in or upon any building, place or premises, and in case prompt payment for the same shall not be made they may shut off the water from such building, place or premises, and shall not be compelled again to supply said building, place or premises with water until said arrears with interest thereon, together with the cost and expense of turning said water off and on shall be fully paid.

SEC. 26. In addition to all other powers conferred upon said board, they are authorized to, and shall assess upon each and every lot in the city of St. Paul in front of which water

pipes are laid an annual tax or assessment of ten (10) cents per lineal foot of the frontage of such lot or lots, and which shall be a lien upon such lot or lots and shall be collected as hereinafter provided.

SEC. 27. That the said board shall make up, on or before the first (1st) day of August in each and every year, a detailed statement, duly certified to by the president and secretary of said board of commissioners under the seal of said board for the tax or assessment described in the foregoing section for the year preceding and ending on the first (1st) day of December, which statement shall be transmitted by the secretary of said board to the county auditor of Ramsey county as delinquent taxes for collection; whereupon it shall be the duty of the county auditor to extend the same on his rolls against the property in said statement as aforesaid, for collection, and if not paid within the time prescribed by law then the same shall become a lien on said real estate, and said real estate shall be subject to all the penalties and charges as property delinquent for taxes for county and state purposes. All moneys collected or paid into the treasury of Ramsey county on account of said assessment or tax shall be paid over, from time to time, to the city of St. Paul for the use of said board of water commissioners.

\* \* \*

SEC. 34. Any and all causes of action, either at law or in equity, which may now exist, or which may hereafter occur by reason of any act or omission by or on the part of the board of water commissioners, or of any of its servants, agents, employees, or otherwise, shall be brought and maintained by such claimant or claimants against the said board of water commissioners, anything in the statutes of the state of Minnesota to the contrary notwithstanding. And any and all judgments recovered against said board of water commissioners shall be paid out of any moneys in the hands of the city treasurer of the city of St. Paul belonging to said board, as other indebtednesses are paid.

SEC 36. The term "real estate," as used in this act, shall be construed to signify and embrace all uplands, lands under water, the waters of any lake, pond or stream, all and every estate, interest, and right, legal and equitable, in lands or water, including term for years, and liens thereon by way of judgment, mortgage or otherwise, and also all claims for damage to such real estate. \* \* \*

SEC. 37. This act shall take effect and be in force from and after its passage.

Approved March 4, 1885.

*Page 287, Laws of Minnesota, 1885.*

## 9.

### SYLLABUS AND OPINION OF SUPREME COURT OF MINNESOTA IN CASES AT BAR.

#### SYLLABUS.

1. The rights of riparian owners on navigable or public streams of water are subordinate to public uses of such water, and the rights of these appellants under their charters are equally subordinate to such public uses.
2. The public have the right to apply the waters of a navigable stream to public uses without making compensation to riparian owners.
3. The navigation of the stream is not the only public use to which these public waters may be applied. The right to draw from them a supply of water for the ordinary use of cities in their vicinity is such a public use, and this right is not affected by the fact that consumers are charged for water used as a means of paying the cost of maintaining the plant.

4. In thus taking water from navigable streams or lakes for ordinary public uses the State is not controlled by the rules which obtain between riparian owners as to the diversion from and return of water to its natural channels.

5. Certain provisions in respondent's charter relating to compensation for damages arising out of the taking and diversion of water construed: Held, that those provisions were not intended to provide for compensation to riparian owners on navigable or public streams.

#### OPINION.

These cases were tried together in the court below, and when plaintiffs, appellants here, rested both actions were dismissed upon defendant's motion. From orders refusing new trials appeals were taken. Plaintiffs are corporations created in 1856 by acts of the territorial legislature and authorized to build and maintain dams in the Mississippi river, at the falls of St. Anthony, about ten miles above St. Paul, for the development of water power and for the use and sale of such power. One of these corporations, owning the shore on the east side of the river, erected a dam to the proper point in the river channel, and the other, owning the west shore, built its dam so as connect the two, thus forming a power which has ever since been maintained and used.

In 1883 the legislature authorized the city of St. Paul to purchase, and there was purchased, the property and franchises of a private corporation theretofore engaged in supplying said city with water. A board of water commissioners was created by the same act, and that board, a branch of the city government is the present respondent. By the provisions of an amendatory act, G. L. 1885, ch. 110, sec. 5, et seq., the board was authorized and empowered to add to its sources of supply and to draw water from any lake or creek, and in general to do any act necessary in order to furnish an adequate supply of water for the use of the city. The manner in which it should

acquire the right to extend its works so as to connect with any body of water deemed necessary for an increased supply was specified, and in section 7 it was provided that "after making compensation as hereinafter provided to the owners of or the persons interested in the lands so as to be taken and for damages by reason of diverting the water of any stream, creek or body of water, said city shall have an easement therein." In section 8 provisions was made for the appointment of commissioners to assess the damages sustained by the owners of lands to be taken, or by other persons by reason of such taking or arising by the construction, use and operation of the works. Under this act the defendant duly established a pumping station at Lake Baldwin, a body of water with an area less than a mile square, and by means of its pumps forced water through conduits to the city for public use. The outlet of this lake is Rice creek, and this creek empties into the Mississippi river a few miles above the dams built and maintained by appellants. Claiming that the result of this diversion of water was to greatly diminish the volume which came to the dam and to materially affect and reduce the water power, plaintiffs brought these actions to restrain and enjoin perpetually the operation of defendant's works at the lake and the diversion of water therefrom.

Counsel for both parties made lengthy oral arguments and have filed very full briefs. Many questions have been discussed which we do not regard as connected with the case, and hence we need not refer to them. There are a few well settled principles which we regard as covering and controlling the facts before us, and a statement of these, with a construction of certain parts of the act under which defendant's board was authorized to obtain further and other sources of water supply, will dispose of these appeals.

1. The plaintiffs are riparian owners on a navigable or public stream, and their rights as such owners are subordinate to public uses of the water in the stream. And their rights

under their charters are, equally with their rights as riparian owners, subordinate to these public uses.

2. There can be no doubt but that the public, through their representatives, have the right to apply these waters to such public uses without providing for or making compensation to riparian owners.

3. The navigation of the stream is not the only public use to which these public waters may be thus applied. The right to draw from them a supply of water for the ordinary use of cities in their vicinity is such a public use and has always been so recognized. At the present time it is one of the most important public rights, and is daily growing in importance as population increases. The fact that the cities, through boards of commissioners or officers whose functions are to manage this branch of the municipal government, charge consumers for water used by them as a means for paying the cost and expenses of maintaining and operating the plant, or that such consumers use the water for their domestic and such other purposes as water is ordinarily furnished by city water works, does not affect the real character of the use or deprive it of its public nature.

4. In thus taking water from navigable streams or lakes for such ordinary public uses the power of the State is not limited or controlled by the rules which obtain between riparian owners as to the diversion from and its return to its natural channels. Once conceding that the taking is for a public use and the above proposition naturally follows.

5. Turning now to the provisions of defendant's charter, Laws 1885, ch. 110, it will be seen that the board was not limited to public waters as the sources of its contemplated additional supplies. It was authorized to appropriate private waters for the purpose, and hence the provisions of the act which provided for the ascertaining of and making compensation for damages caused by a diversion of water must be construed as applying solely to cases where the board took private property by using or diverting merely private waters. Inas-

much as the State itself could use the waters in question as against the plaintiffs without compensation, it would require very clear language to that effect to justify the conclusion that the legislature intended to impose on respondent board the burden of paying plaintiffs for what as against the public they did not own. If the right granted by the legislature had been exclusively to divert waters from a certain specified body of public water, such as one of the "great" ponds of Massachusetts, referred to in the cases cited from the reports of that State, so that the provisions in Laws 1885, ch. 110, relating to compensation, could not apply to anything else,—to the owners of private waters, for instance,—the construction contended for by appellants that it was intended they should be compensated in case damages resulted might arise by implication.

Orders affirmed.

COLLINS, J.

The chief justice did not sit. Vanderburgh, J., took no part in the decision.

*Vol. 56 Minnesota Reports p. 485.*

## INDEX.

	Page.
Statement of Case, . . . . .	2
Statement of Facts, . . . . .	3
The Pleadings, . . . . .	3
The Facts as shown by the Record, . . . . .	6
1. The Situation of Plaintiffs in Error, . . . . .	6
2. Situation and Acts of Defendant, . . . . .	9
3. The Damage to Plaintiffs, . . . . .	11
The Decision of the State Court, . . . . .	13
Assignments and Specifications of Error, . . . . .	16

### ARGUMENT.

I. The Question of Jurisdiction, . . . . .	21
II. The Statute of 1885 deprives Plaintiff of their property without due process of law, . . . . .	24
1. The rules of property governing the property rights of plaintiffs as against the uses of the defendant are established by general principles of law beyond the power of the Minnesota Courts to disregard, .	25
The Riparian owners right to the use of the water in general, .	26
Limits of rights of a city as riparian owner, . . . . .	27
Origin and limits of the paramount "Sovereign Power of control" of the State over navigable streams in this country—It does not extend to diversions not connected with navigation—Compensation required for diversion for city use, . . . . .	28-37
Peculiar cases in Pennsylvania, . . . . .	37
Peculiar cases in New York, . . . . .	37
Peculiar cases in Massachusetts, . . . . .	38
Exceptional case in Vermont, . . . . .	41
2. The cases of <i>Hardan vs Jordan</i> and <i>Pucker vs Bird</i> —The State could never acquire, either through its Legislature or its Courts, the prerogative right to authorize this diversion without compensation to Plaintiffs, . . . . .	42
3. If the State ever had such right, it has released it by plaintiffs' charters, . . . . .	46

	Page.
4. The State of Minnesota itself, by the decisions of its Supreme Court, has fixed plaintiff's rights as we claim and has established a rule of property which requires compensation to be made for this diversion, . . . . .	48
<i>Schurmeier vs. Railway Co.</i> , 10 Minn. 82, . . . . .	50
<i>Brisbine vs. R. R. Co.</i> , 23 Minn. 114, . . . . .	51
<i>Morrill vs. St. A. F. W. P. Co.</i> , 26 Minn. 222, . . . . .	53
<i>Bradshaw vs. Duluth Imperial Mill Co.</i> , 52 Minn. 59, . . . . .	57
<i>State vs. Minneapolis Mill Co.</i> , 26 Minn. 229, . . . . .	58
<i>St. A. F. W. P. Co. vs. Minneapolis</i> , 41 Minn. 270, . . . . .	59
<i>Union Depot Co. vs. Brunswick</i> , 31 Minn. 297, . . . . .	60
<i>Hanford vs. St. Paul &amp; Duluth Ry. Co.</i> , 43 Minn. 104, . . . . .	62
Any interference with, or damage to, riparian property, or to its use, is in Minnesota a "taking" of property, . . . . .	66
The rule of property governing plaintiffs' rights, as it must be gathered from the Minnesota decisions, . . . . .	68
5. The Statute of 1885 deprives plaintiffs of their property for a private use without compensation, . . . . .	72
6. A taking of plaintiffs' property for both a public use and a private use without compensation having been shown, the Statute of 1885 has the effect to take their property without due process of law, . . . . .	75
Property rights of plaintiffs have been shown to be not subject to any right of State to divert for defendant without compensation, . . . . .	75
The fundamental laws and constitution of Minnesota require compensation to be made, . . . . .	76
III. The statute of 1885 impairs the obligation of the contract rights invested in plaintiffs by their charters, . . . . .	77
IV. Conclusion, . . . . .	85
<b>APPENDIX.</b>	
1. Extracts of Ordinance of 1787, . . . . .	88
2. Extracts from Organic Act of Minnesota, . . . . .	89
3. Extracts from Act authorizing a State Government, . . . . .	91
4. Extracts from Constitution of the State of Minnesota, . . . . .	92
5. Extracts from Act of Admission into the Union, . . . . .	95
6. Charter of St. A. F. W. P. Co., . . . . .	96
7. Charter of Minneapolis Mill Co., . . . . .	101
8. Extracts from Chapter 110, Laws of 1885—Charter of Defendant, .	106
9. Syllabus and Opinion of Supreme Court of Minnesota in cases at bar,	113



OCT 12 1897

JAMES H. MCKEVENY

9.6

State Oct. 12, 1897.

THE W. A. ANTHONY PALM WATER COMPANY,  
PANT,

Plaintiff in Error,

VS.  
THE BOARD OF WATER COMMISSIONERS OF  
THE CITY OF ST. PAUL,

No. 26.

THE MINNEAPOLIS MILL COMPANY,

Plaintiff in Error,

vs.

THE BOARD OF WATER COMMISSIONERS OF  
THE CITY OF ST. PAUL,

In Error to the Supreme Court of the  
State of Minnesota.

Brief and Argument for  
Defendant.

JAMES E. MARKHAM,

Corporation Attorney of the City of St. Paul,

Attorney for Defendant.

3

# Supreme Court of the United States.

OCTOBER TERM, 1897.

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THE ST. ANTHONY FALLS WATER POWER COMPANY,

Plaintiff in Error,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL.

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THE MINNEAPOLIS MILL COMPANY,

Plaintiff in Error,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL.

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## STATEMENT OF FACTS.

By an act of the legislative assembly of the Territory of Minnesota, approved May 23, 1857, and entitled: "An Act to incorporate the St. Paul Water Company," the St. Paul Water Company was organized for the purpose of introducing water into the City of St. Paul from any place or places situate in the County of Ramsey, and to lay water pipes in and through the streets, avenues, lanes, alleys and squares of said city, and to have sole and exclusive right to lay pipes for conducting water in any of such streets, avenues, lanes, al-

leys and squares, and to adopt any other necessary means to furnish water to the inhabitants of said city. This act of the legislature confers upon such corporation the power to secure title to the necessary real estate to be used in connection with the furnishing of water to said city, and also sufficient authority for the erection and maintaining of all the necessary buildings, fixtures and machinery necessary to be used in the operation of such system of water works, and the furnishing of water to the inhabitants of such city.

Ch. 4 of the Laws of Extra Session of 1857, pg. 48.

The original act of incorporation of this company was amended from time to time, granting additional powers and perfecting the rights granted by the original act of incorporation so as to provide a more sure and speedy means of accomplishing the main object intended by the original act of incorporation.

Ch. 61, Special Laws of 1858, pg. 173.

Ch. 74, Special Laws of 1861, pg. 330.

Ch. 83, Special Laws of 1866, pg. 234.

Ch. 119, Special Laws of 1868, pg. 414.

Ch. 120, Special Laws of 1869, pg. 346.

Ch. 103, Special Laws of 1872, pg. 449.

Ch. 139, Special Laws of 1874, pg. 361.

\* From the time of the original incorporation of the St. Paul Water Company until the purchase of its property, rights and franchises by the City of St. Paul, there was reserved by these various acts to the city the right to consummate such purchase.

See Sec. 9 of the Act of the Legislative Assembly

of 1857, pg. 50 of the Laws of Extra Session of that year, also Sec. 3 of Ch. 119 of the Special Laws of 1868.

Pursuant to the authority vested in the St. Paul Water Company by these various acts of the Legislature, that company established a system of water works for the purpose of furnishing water to the inhabitants of this city, and connected such system with Lake Phalen, a body of water situated about three miles northeasterly from the central portion of the city. That company never extended its water works so as to connect with any other body of water. As the city increased in size and population, the water supply that was furnished by the St. Paul Water Company was inadequate, and proceedings were had on behalf of the city, by virtue of legislative authority, for the purchase of the rights and franchises of the St. Paul Water Company. A law was specially enacted for this purpose, entitled, "An Act to authorize the City of St. Paul to purchase the franchises and property of the St. Paul Water Company, and creating the Board of Water Commissioners," and approved February 10, 1881, (Special Laws of 1881, Ch. 188). This act was amended in some minor respects by Chapter 75 of the Special Laws of 1883. Another law to further perfect the right of defendant was enacted in 1885, entitled, "An Act to amend and consolidate an act to authorize the City of St. Paul to purchase the franchises and property of the St. Paul Water Company and creating the Board of Water Commissioners, approved February ten (10), one thousand, eight hundred and eighty-one (1881), and the

act amendatory thereof, approved the twenty-fifth (25) day of January, one thousand, eight hundred and eighty-three (1883)" (Special Laws of 1885, Ch. 110).

The provisions of these various acts last referred to were complied with on behalf of the City of St. Paul, and conveyances were executed by the St. Paul Water Company transferring all of its property, rights and franchises to said city, and a board of water commissioners was appointed, as provided by such acts, and has continuously for more than twelve years had the charge and control of the water works system of the City of St. Paul under and by virtue of said Chapter one hundred and ten of the Special Laws of 1885. This law is comprehensive. The grants of power contained are sufficient to enable this defendant to do all the necessary, useful and convenient acts that may be at any time required to enable it to secure a sufficient supply of pure and wholesome water for the City of St. Paul. The board of water commissioners is given full power and authority to take and convey from any of the sources used by the St. Paul Water Company or which it was empowered to use, and from any other source sufficient to supply the City of St. Paul with pure and wholesome water for all purposes, and for the purposes aforesaid in all things to exercise all the necessary rights, powers and franchises of the said St. Paul Water Company conveyed to the City of St. Paul.

That the said powers of water commissioners may from time to time for the purpose of furnishing a full supply of water to the inhabitants of the City of St. Paul, extend said water works or make new lines of

works and as it shall from time to time so extend its said works or make new lines of works, it may draw water from any lake or creek by means of pipes, ditches, drains, conduits, aqueduct or other means of conducting water, so as to connect said lakes or creeks with its said work, and may erect and construct drains, bulk heads, gates and other needful structures and means for controlling of water and protection, and in general to do any other act necessary or convenient for accomplishing the purpose contemplated by this act.

Whenever at any time said board shall propose to extend its said works so as to connect with any of said lakes or creeks or to divert the water of any stream, creek or body of water, it shall proceed as follows: Said board shall cause to be made a survey of the land along which it shall so propose to extend said work, and of all lands and other property to be affected by flowage, drainage or otherwise, and for that purpose it may, by its officers and agents enter upon any lands doing no unnecessary damage thereto. After such survey shall have been made, and such line located, it shall cause to be made a map showing the location of said line and the lands necessary to be taken for such extension, and of lands and other property to be affected by the drainage or otherwise. Said map shall be acknowledged by the surveyor making the same and by the president of the board of water commissioners, and shall be filed as a record in the office of the register of deeds of the proper county, and after making compensation as hereafter provided to the owners of or persons interested in the land so to be taken, and for damages by reason of diverting the water of

any creek, stream or body of water, said city shall have an easement in said land designated on said map for all purposes contemplated in this act, which said easement shall include the right to passage, without doing unreasonable damage, from any public highway to and from the land included or covered by said easement.

Provision is made by subsequent sections of this act for the application to the district court of the county wherein the lands are situated for the appointment of commissioners to assess the damages for the land so taken, also provides for the giving of notice of their meeting to make an award of damages on account of the lands which are condemned for the use of the board of water commissioners. Provision is also made for an appeal by the party whose land has been condemned from the award made by such commissioners to the district court of the county in which the lands are situated, and by Section ten it is also provided that whenever the board of water commissioners file their maps as required by Section seven of this act, the board shall be deemed to be in possession of the lands and right of way as represented on their map or maps, or of any other lands they may occupy or have damaged in the construction of their works for the purpose of introducing and supplying the City of St. Paul with pure water, either by flowage, drainage or otherwise, either by consent of the owner or owners, or not, of the land used or occupied that is not shown on their map or maps that the owner or owners have not been settled with nor the lands paid for as required by Section eight of this act and then provision is made for the

maintaining of actions by parties whose land has been taken and which has not been condemned. In such actions the board of water commissioners is permitted to then contest the right of the party claiming to recover the land and in case such party shall succeed in establishing the title, to ask to have the same condemned in the same proceeding and a full procedure for this purpose is established. The subsequent sections of the act provide more in detail for the operation of the water works system of the city, the regulation, distribution and use of the water in said city.

As has already been stated, the water furnished to the city by the St. Paul Water Company was all taken from Lake Phalen, situated northeasterly from the business portion of the city. Because the supply furnished from that source was insufficient, the board of water commissioners surveyed and located a new line of works extending to a system of lakes and in a northwesterly direction from the City of St. Paul, and that board has been furnishing the city with water from this new water supply for a number of years. During this time it has also maintained the former system and has also furnished water to a large portion of the city from Lake Phalen. These two systems are entirely independent of each other. The water flowing into Lake Phalen never would, under any circumstances, flow into the lakes lying northwesterly of the city and which are also used.

In connection with the system of lakes lying northwesterly of the city and from which water is drawn to supply the city, the defendants secured title to a tract of land lying on the

southerly shore of Lake Baldwin, a small inland lake in Anoka county, and the defendant erected a pumping house upon the shore of that lake and during the years 1890, 1891 and 1892 pumped small amounts of water from Baldwin Lake to a point a short distance south therefrom and whose elevation is considerably higher than the surface of Baldwin Lake, and also the territory lying in the vicinity of Pleasant Lake. From this elevation the water flowed through an open ditch to Charles Lake, which is connected with the other lakes northwesterly of the city, and from which water is supplied, as has been stated.

The plaintiff, the St. Anthony Falls Water Power Company, was incorporated pursuant to the provisions of Chapter 137 of the Laws of Minnesota of 1856, being an act entitled "An Act to incorporate the St. Anthony Falls Water Power Company," and was approved February 26, 1856.

See page 215 of the Laws of Minnesota of 1856.

That Company was authorized for the purpose of the improvement of the water power above and below the falls of St. Anthony to construct and maintain dams, etc., to the center of the river. This power is incidental to the main powers of the corporation granted by Section one.

The plaintiff, the Minneapolis Mill Company was incorporated pursuant to Chapter 45 of the Laws of the same year (see page 236) entitled, "An Act to incorporate the Minneapolis Mill Company," and approved February 27, 1856, the day following the approval of the act incorporating the St. Anthony Falls Water Power Company. Substantially the same powers are

given the Minneapolis Mill Company as are granted the other company.

Section eleven of the later act provides that it may be amended by any subsequent legislative assembly in any manner not destroying or impairing the vested rights of the corporators, and providing that nothing in such act contained shall be so construed as to authorize said corporators to interfere with the rights and properties of any other person or persons whatever. The same proviso with respect to interfering with the rights and properties of other persons is also found in Section nine of the act relating to the St. Anthony Falls Water Power Company.

By Section twelve of the later act it is provided that nothing contained in the act entitled "An Act to incorporate the St. Anthony Falls Water Power Company," shall be so construed as to allow the said St. Anthony Falls Water Power Company to maintain or construct dams or of extending beyond the center of the channel of the Mississippi River from the western bank of Hennepin island and said St. Anthony Falls Water Power Company is restricted in the exercise and power of the powers and privileges granted by the ninth section of said act, to the space between the western bank of said island and the center of said river, and providing that the dams shall always be provided with suitable slides and sluices so as to permit the passage of logs and timber down the Mississippi River, AND THAT ANY FUTURE LEGISLATURE MAY AMEND THIS ACT OR THE ACT TO WHICH THIS SECTION IS AMENDATORY, and

provided further that the Minneapolis Mill Company shall be restricted in its operations to the center of the same channel of the Mississippi River as to the property belonging to said company.

Under the authority conferred by these acts and the amendments thereto, the plaintiffs have each constructed dams in the Mississippi River at St. Anthony Falls. The St. Anthony Falls Water Power Company having erected a dam from the east bank of the river to a point in the channel of the river to connect with the dam erected by the Minneapolis Mill Company from the bank on the west side of the river to the channel of the river, and each company has since, and has for many years maintained the dam erected, together with the necessary appurtenances connected therewith for the purpose of furnishing water power to manufacturing industries situated in the locality of these companies' property, and these plaintiffs now claim that they have the right to use all of the water that might at any time naturally flow in the Mississippi River and past the property of the plaintiffs. The claim of the plaintiffs being so broad that the right which they insist upon is the exclusive right to use all of the waters that would naturally flow in the Mississippi River and over the falls of St. Anthony, and that no person, company, corporation, the State of Minnesota or any of the municipal subdivisions thereof have a right to in any manner interfere with or to lessen the natural flow of water in the Mississippi River over these falls, even if such act is done by the state itself or by any

municipal subdivision thereof duly authorized by the state so to do and to devote the water to public use.

The defendant did, as has been stated, during the years 1890, 1891 and 1892 pump from the Baldwin Lake hereinbefore referred to, small quantities of water ranging from a daily average of two million and six hundred thousand gallons per month to ten million, two hundred sixty-six thousand and six hundred gallons. The largest amount that was pumped was in July, 1891; the smallest quantity being in the month of March, 1890. The plaintiffs claim that by virtue of this act on the part of defendant the amount of water flowing in the Mississippi River and over the falls of St. Anthony was diminished to ninety-five per cent of the quantities pumped by the defendant and thereby lessened the amount of water power which might be utilized at the dams of the plaintiffs.

#### ARGUMENT.

The record shows that two questions have been raised which will doubtless be urged as giving this court jurisdiction to entertain this case. They are found in the petition of the appellants for a reargument in the Supreme Court of the State of Minnesota, pages 79 to 81 of the printed transcript of the record.

First: That by the act to authorize the people of Minnesota to form a constitution and state government, approved February 26, 1857, and by the acceptance of that act, the right to use the waters flowing in the Mississippi river is limited and can only be used

for the purpose of navigation; that is, that the Mississippi river shall be a common highway and forever free as well to the inhabitants of the state of Minnesota as to all other citizens of the United States, and that all waters that would naturally flow in said river shall be permitted to flow there without diminution or diversion of any of the same irrespective as to the quantities that would naturally flow in such river, and irrespective of the purposes for which the same should be used.

It would seem, however, that irrespective of this claim that the plaintiffs in order to succeed must also insist that by reason of their being owners of land on the banks of the Mississippi river, that they have the absolute right to insist that all the waters naturally flowing into said river should perpetually flow there and that the right so claimed is a property right existing by virtue of the act referred to.

Second: The second claim is that the waters which have been taken from Baldwin Lake have been devoted to private use, and that as the taking of private property of one person for the private use of another person is inhibited by the constitution of the United States, this court has jurisdiction to re-examine into the judgment rendered by the Supreme Court of the state of Minnesota.

But as affecting this second question, it would also seem that it is based upon the supposed property rights referred to.

Unless one or both of these propositions of plaintiffs be true, they have no standing in this court and the writ of error must be dismissed.

**ARGUMENT ON QUESTION OF JURISDICTION.****I.**

The first question which arises for consideration, is whether this court has jurisdiction to re-examine the judgments rendered in the Supreme Court of the state of Minnesota in these actions.

This jurisdiction, if it exists at all, must exist by virtue of some statute of the United States, and to determine this question, it is necessary to refer to the provisions authorizing the re-examination of judgments of the state courts by this court, but before doing so we desire to emphasize the fact that the rights which the plaintiffs have, if any, and which they are seeking to protect in these actions, are rights which exist because they are riparian owners upon the banks of the Mississippi river, and while it may be argued that such rights are protected in some manner by the constitution and laws of the United States, we insist at the outset that the rights which they have as riparian owners must be determined by the common law. Such rights are neither created nor do they exist by virtue of the constitution or any of the statutes of the United States, neither do they exist by virtue of the constitution or any of the statutes of the state of Minnesota, and in order to establish what the rights of these parties are as riparian owners, resort must be had to the common law, and if such is the case, as insisted by the defendants, the plaintiffs will have no standing whatsoever in this court. These actions were brought in the state court, and the state court has decided what the rights of the plaintiffs are as riparian owners upon this

stream, and while if these actions could have been brought in the United States court a different conclusion might have been reached as to the common law with respect to such rights, this court cannot re-examine the judgment of the Supreme Court of the state of Minnesota on those grounds, and while it is doubtless the doctrine of this court that as to questions of general law the United States court, sitting within and for any of the states, is not bound to follow the law of such state on such questions, it is equally true that when a party has brought his action in the state court to have his rights determined, and which rights must be determined by the principles of the common law, the decision of the state courts on those questions are binding upon the party, and can not be reviewed or re-examined by the courts of the United States.

## II.

The plaintiffs called the attention of the Supreme Court of Minnesota, in their petition for a reargument, to the act of congress passed February 26, 1857, entitled "An act to authorize the people of Minnesota to form a constitution and state government preparatory to their admission into the Union on an equal footing with the original states," and particularly section two of said act, fixing the jurisdiction of the state of Minnesota over the Mississippi river and all waters tributary thereto, and section three of article two of the constitution of the state of Minnesota accepting and ratifying said act of congress. It has never been considered that the act authorizing the people of Minnesota to

form a state government was ever designed to modify the general principles of the common law relative to the rights of riparian owners upon navigable streams, or other navigable waters.

The act referred to provides by the first section what shall be the boundary of the state of Minnesota, and authorizing the people within such boundary to form a constitution and state government, and to come into the Union on an equal footing with the original states, according to the federal constitution.

Section two, in the first instance, is a grant of jurisdiction to such state. That is, the state of Minnesota shall have concurrent jurisdiction on the Mississippi river, and all other rivers and waters bordering on said state of Minnesota, so far as the same shall form a common boundary to said state, and any state or states now or hereafter to be formed or bounded by the same.

(It is not necessary at this time to consider what the jurisdiction of the state would be on such river aside from this act, but the state having been given such concurrent jurisdiction, its authority in all criminal and civil matters and other public matters, is equal to the other states bordering on such river.)

The second part of said section provides that said river, or waters leading into the same, shall be common highways and forever free as well to the inhabitants of said states as to all other citizens of the United States, without any tax or duty, imposts or toll therefor. That is, the United States government has reserved these rivers for the purpose of navigation, and for such purposes they are free, and the United States government has undoubted authority over such rivers

for the purpose of maintaining them as common highways, and authority to prevent any act which will interfere with the navigation of such rivers. Further than this the United States government has not reserved any control over the Mississippi river, nor has it granted any rights to any person in the waters thereof.

Section three provides for the election of delegates to a convention for the purpose of forming the constitution.

Section four provides for the taking of the census in case such convention shall decide in favor of the immediate admission of the proposed state into the Union; also provides for members of the house of representatives.

Section five provides for five propositions to be acted on by the people of Minnesota in such convention, and that if accepted by the convention they should be obligatory upon the United States and upon the state of Minnesota. The first one is in regard to the granting to the state of two sections in every township of the public lands to the state for the use of the schools of the state. The second provides for the setting apart of seventy-two sections of land for the use and support of a state university. The third proposition is for the granting to the state ten entire sections of land to be selected by the governor for the purpose of completing the public buildings, or for the erection of others, at the seat of government of the state. The fourth proposition relates to the granting of the salt springs within the proposed state, not exceeding twelve in number, with six sections of land adjoining or as contiguous as

may be to each, to the state for its use, while the fifth proposition provides for the paying to the state five per cent of the proceeds of the sale of public lands, for the purpose of making public roads and internal improvements. All of these propositions are on the condition that the said convention, which shall form the constitution of said state, shall provide by a clause in said constitution or an ordinance, irrevocable without the consent of the United States that said state shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations congress may find necessary for securing the title in said soil to bona fide purchasers thereof, and that no tax shall be imposed on the lands belonging to the United States, and that in no case shall non-resident proprietors be taxed higher than residents.

It is impossible to find anything in this act relating to riparian rights. There might doubtless be certain questions rising under some of the propositions contained in the fifth section which would give rise or regulate private rights and which are protected by the act, but those matters are specific. The question as to the rights of riparian owners, whether on public or private waters, as has been before said is determined by the principles of the common law, and it is hardly to be imagined that in an act authorizing the formation of a state government which is designed primarily to confer and establish jurisdiction upon the people of such state and to preserve intact in the territory about to be formed into a state certain fundamental principles of government which have become settled principles of our national jurisprudence, that congress

should undertake to establish or regulate the rights of riparian owners upon navigable or non-navigable waters. Such rights have been enunciated from time to time with the growth of the common law, and it has never been contended by the people through their representatives in congress or in any assembly ever called to discuss the fundamental principals of our government that the common law is in any way defective with respect to such rights, and therefore it must be plain that the act referred to does not create or establish any rights in the plaintiffs as riparian owners.

### III.

Referring now to the statute it will be seen that this court has no jurisdiction, unless in the decision in the state court there "is drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision is against their validity," or there "is drawn in question the validity of a statute of or an authority exercised under any state on the ground of their being repugnant to the constitution, treaties or laws of the United States and the decision is in favor of their validity," or unless some "title, right, privilege or immunity is claimed under the constitution or any treaty or statute of or commission held or authority exercised under the United States and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority."

Upon an examination of the record it will not be found that the trial court or the Supreme Court of the state of Minnesota ever passed upon any question such as to give this court jurisdiction, nor was the attention of those courts at any proper time ever called to any such question. The first intimation that the Supreme Court of Minnesota had that the plaintiffs claimed some right which might possibly give this court jurisdiction, was upon their petition for a rehearing after the decision of the case by the Supreme Court of Minnesota (see page 80). The opinion rendered by the Supreme Court of Minnesota determines two questions stated in five propositions in the syllabus of the decision. That court determines first, what are the rights of the plaintiff as riparian owners on the Mississippi river as against the defendant, and second, that the provisions of the charter of the defendant do not contemplate the providing of compensation to riparian owners on navigable or public streams. No other questions were in reality decided by the Supreme Court of Minnesota. Neither one of these questions has anything to do with any title, right, privilege or immunity claimed under the constitution of the United States or any treaty or statute of or commission held or authority exercised under the United States.

In view of the many decisions of this court, it seems hardly necessary to argue this question, but as it must necessarily be urged that this court has jurisdiction, this question must be examined into to some extent. The defendant claims, first, from the provisions of the statute referred to and what appears from the record,

that the writ of error in these cases must be dismissed for want of jurisdiction in this court to re-examine the final judgment of the Supreme Court of Minnesota because the plaintiffs did not in that court draw in question any statute of the state upon the ground that the same was repugnant to the constitution of the United States, nor specially set up or claim in that court any right, title privilege or immunity under the constitution or any statute of the United States.

Looking into the record of this case it is not to be found that any reference is made in the court of original jurisdiction to the constitution of the United States or any statute thereof, nor can it be inferred from the opinion of the Supreme Court of Minnesota that that court was informed by the contention of the parties that any federal right, privilege or immunity was intended to be asserted, and from anything that appears in the record the state court proceeded in its determination of the cause without any idea that it was contemplated that that court should decide a federal question. There are a few well settled principles which we regard as covering and controlling the facts before us, and a statement of these with a construction of certain parts of the act under which respondent's board was authorized to obtain further and other sources of water supply will dispose of these appeals, and in the determination of this question of jurisdiction it must be taken as an undoubted fact that no federal question was presented at any time unless upon the petition for a rehearing.

Attention is called to the case of Oxley Stave Com-

pany against Butler County, 166 U. S. 648. This court said in that case, that

"This court may re-examine the final judgment of the highest court of a state, when the validity of a treaty or statute of, or an authority exercised under the United States is drawn in question and the decision is against its validity, or when the validity of a statute of or an authority exercised under any state is drawn in question on the ground of repugnancy to the constitution, treaties or laws of the United States, and the decision is in favor of its validity. But it cannot review such final judgment, even if it denied some title, right, privilege or immunity of the unsuccessful party, unless it appear from the record that such title, right, privilege or immunity was 'specially set up or claimed' in the state court as belonging to such party under the constitution, or some treaty, statute, commission or authority of the United States."

This court, after referring to the facts in that case as to whether or not any federal question was "specially set up or claimed," stated that "this question must receive a negative answer, if due effect be given to the words 'specially set up or claimed' in section 709 of the Revised Statutes. These words were in the twenty-fifth section of the judiciary act of 1789 (1 Stat. 85), and were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a state, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the constitution, treaties or statutes of the United States. The words

'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare, and unless he does so declare 'special-ly,' (that is, unmistakably), this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the Circuit Courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. Hence the averment that a party resides in a particular state does not import that he is a citizen of that state. *Brown v. Keene*, 8 Pet. 115; *Robertson v. Cease*, 97 U. S. 646-649. Upon like grounds the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right."

It would seem from the statement of the opinion in this case that when it was argued there were some indications that the decision of this court upon this subject had been misapprehended, and the court reviews its decisions in that respect and arrives at the conclusions which have been quoted.

In the case of *Levy v. Superior Court of San Fran-*

cisco, 167 U. S. 175, reference is made to the case referred to above as follows:

"We said in Oxley Stave Company v. Butler County, 166 U. S. 648, that the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from inference but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right."

As has been stated, it will doubtless be claimed that a federal question was raised when the plaintiffs petitioned the Supreme Court for a rehearing. If any federal question was raised by such petition, that question was raised too late so far as the revisory power of this court is concerned. The case of Pim v. St. Louis, 165 U. S. 273, is, so far as the assertion of a federal right by a petition for a rehearing, identical with these cases, and this court in its opinion in that case say:

"Upon inspecting the record we find that no federal right was set up or claimed in any form until after the final decision of the case by the Supreme Court of Missouri, and that by petition for rehearing. This petition was overruled by that court without any determination of the alleged federal question, indeed, without any illusion to it. The claim of a federal right came too late so far as the revisory power of this court is concerned. Loeber v. Schroeder, 149, U. S. 580-585; Sayward v. Denny, 158 U. S. 180-183."

On the other hand, unless the decision of the federal

question raised in the state court is necessary to sustain the judgment, this court will not review such decision.

In the case of *Dibble v. Bellingham Bay Land Company*, 163 U. S. 63, it is stated that, "If the record discloses that a question has been raised and decided adversely to a party claiming the benefit of a provision of the constitution of the United States, and another question not federal has also been raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question to sustain the decision, this court will not review the judgment. *Eustis v. Bolles*, 150 U. S. 361, 366."

"If it appears that the court did in fact base its judgment on such independent ground, or, where it does, not appear on which of the two grounds the judgment was based, if the independent ground on which it might have been based was a good and valid one, sufficient in itself to sustain the judgment, this court will not assume jurisdiction. *Klinger v. Missouri* 13 Wall 257."

In *Fowler et al. v. Lamson et al.*, 164 U. S. 252, the court in discussing this question of jurisdiction say: 'Where a case is brought to this court on error or appeal from a judgment of a state court, unless it appear in the record that a federal question was raised in the state court before the entry of final judgment in the case, this court is without jurisdiction. *Zimman v. Nebraska*, 116 U. S. 54.'

"It has also been frequently decided that to give this court jurisdiction on writ of error to a state

court, it must appear affirmatively not only that a federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause and that it was decided adversely to the party claiming a right under the federal laws or constitution, or that the judgment as rendered could not have been given without deciding it. *Eustis v. Bolles*, 150 U. S. 361; *Powder Works v. Davis*, 151 U. S. 389-393; *Railway Co. v. Fitzgerald*, 160 U. S. 556-576.

In the case of *Egan v. Hart*, 165 U. S. 188, it is stated by the court that "It is clear that if these questions of fact are adequate to determine the controversy between the parties, and broad enough to maintain the judgment independent of any federal question, they were without jurisdiction, although the state court may have also decided such a question."

It seems to necessarily follow from the provisions of section 709 of the Revised Statutes of the United States referred to as interpreted by this court in numerous decisions, that no federal question was ever presented to the state court for a determination, and that the attempted presentation to the state Supreme Court of the state of Minnesota on a petition for re-hearing came too late to give this court jurisdiction to re-examine the judgment of that court. Furthermore, that court has never determined any federal question adversely to the plaintiffs in these actions. It hardly could have done so for no such question was ever raised in the state court. The facts presented in the records in this case are sufficient to sustain the judgment of the state court without reference to any federal

question. The principal question involved in these cases was as to the rights of the plaintiffs as riparian owners upon the banks of the Mississippi river. This was determined adversely to the claim of the plaintiffs, and no federal question arises in the determination of those rights. The determination of the Supreme Court of Minnesota that by the act creating the defendant in this action, it was not required to make compensation to parties owning land on navigable streams and bodies of water, does not involve any federal question. It is simply a question of the proper interpretation of that statute, and such interpretation will be followed by this court.

For these reasons the writ of error in these cases to the Supreme Court of the state of Minnesota must be dismissed.

#### ARGUMENT ON THE QUESTION OF RIPARIAN RIGHTS.

The defendant claims that the decision of the Supreme Court of Minnesota in sustaining the rulings of the trial court is correct for the reasons given in the decision, and for other reasons equally cogent, which the defendant now present. We would summarize the points as follows:

1. The state has power to divert the waters of a navigable stream for public purposes without regard to incidental injuries to private persons. Consequently it has the right to do so from the Mississippi river; for at the point in question it is navigable, and plaintiffs

have title to low water mark only, while below low water mark the state owns the river bed.

II. Plaintiffs maintain the mill dams in question only by license from the state, and their claim of injury depends upon alleged property rights arising solely and resting absolutely upon the maintenance of their dams. The right to dam the Mississippi river originating and existing only by the bounty of the state,—by its license,—the state may at any time revoke that license or curtail its benefits. This prerogative it has exercised in granting the defendants the right to take water from any lake or stream which might or might not contribute its waters to the Mississippi. The plaintiffs therefore have no rights against the state, even if they might have rights against private persons.

III. The plaintiffs cannot claim the rights of a riparian owner. The rights alleged to be infringed depend upon the maintenance of the mill dams. The rights of a riparian owner depend upon his ownership of land on the stream and his use of the land under water and opposite his own land. Plaintiffs' mill dams extend 650 and 900 feet up stream and beyond any land owned by them, and without this extension they would be useless.

IV. The right of the state is sovereign, not proprietary, as plaintiffs well urge. Therefore the state granted no property rights in the bed of the stream to plaintiffs, nor does the state attempt to grant such right to defendant. The state merely permitted plaintiffs to use the bed of the Mississippi river with its in-

cidental privileges until it saw fit to limit those privileges by using them for itself. Defendant is not a grantee but a part of the state itself.

V. The use of the water by defendant was trifling and was a reasonable use.

VI. The use of water by plaintiffs was not on their land nor for conducting their own work. A claim of right based upon a system of conducting water to be used on the land of many other persons, not riparian owners, should not be considered either as a riparian or conventional right against an upper owner using the water for a legitimate and reasonable purpose.

VII. The dam of each plaintiff depends upon the maintenance of the dam of the other plaintiff for its usefulness. Each plaintiff depends upon the other for property rights which, it alleges, defendant has infringed. If either plaintiff should open its gates or remove its dam the other could not complain, but the property in the use of the water which it now claims against the world would disappear.

VIII. Defendant is a municipal corporation—a branch of the state government. The use of the water by defendant is a public use. The state has granted the right to defendant to obtain its supply of water from the lakes and streams in question.

IX. The acts creating the defendant and authorizing it to take water from the lakes and streams tributary to the Mississippi river is amendatory of, and a modification of the acts incorporating the plaintiffs, in so far as

those acts granted any rights to use the water of that river.

X. That as the only right the plaintiffs have to use the water of the Mississippi river for furnishing power, depends upon the right given to erect and maintain dams, any subsequent act of the legislature authorizing the use of any water tributary to the river for any public purpose is necessarily a modification of the rights granted the plaintiffs to make use of such waters, even if the value of the use of such waters by plaintiffs is entirely destroyed, and such right on the part of the legislature to authorize such use of the waters by defendants is reserved in the act approved February 27, 1856.

XI. It is not competent for the state to grant to private parties or corporations any right to use the waters of the public lakes and rivers which will prevent the subsequent authorization of the use of such waters for public purposes and without compensation.

#### I.

The state has power to divert the water of a navigable stream for public uses without regard to incidental injuries to private persons. So it has this right in the Mississippi river, which is navigable, the state owning the bed below low water mark.

In the work ascribed to, Lord Hale, "De Jure Maris," recognized as the primary and authoritative exposition of the English common law on riparian rights, it is laid down as the law that fresh rivers of whatever kind,

do of common right belong to the owners of the soil adjacent, so that the owners of either side have the proprietorship of the soil, and consequently the right of fishing *asque filum aquae*, respectively, and if one is the owner of both sides he is the owner of the whole river, and has the right of fishing, according to the extent of his land in length; but the king has the right of property in the sea and its shore, and all arms of the sea where the tide ebbs and flows, including rivers below tidal mark. Lord Hale appears also to sanction the doctrine that the public has a common right of passage for vessels, barges and boats in all rivers, whether fresh or salt, whether the soil be the king's or not, and that the king has jurisdiction to reform and punish nuisances, whether in fresh or salt rivers. But he distinguishes navigable and non-navigable rivers according as they are salt or fresh.

Gould on Waters, sections 6, 51.

People v. Canal Appraisers, 33 N. Y. 469-471.

There are some early English cases which appear to hold rivers to be navigable, or at least subject to the public easement of passage above the tidal mark, but it seems to be the better and consistent opinion that such public rights on fresh rivers are exceptions to the rule and based on prescription.

Gould on Waters, sections 49, 51 and 53.

This old English doctrine distinguishing navigable from non-navigable streams with consequent distinctions in the proprietorship of the bed of the stream has caused much confusion and many different holdings in the courts of the United States where the reverence of

the judges for the common law has made it hard for them to conform their decisions to the necessities arising from the different physical formation of a large inland country. But the English law and its distinctions must be kept in mind in reviewing the decisions of the courts of this country as regards their application to the cases at bar; for, in doing so, we trace the reasons for the decisions and can show when they are applicable and when they are not; and language quoted from them has quite a different effect when read in the light of the questions in controversy, and the conditions and law peculiar to each state, from which it would have if defining doctrines of universal application.

In this state it is well settled that the Mississippi river is a navigable stream, and the riparian proprietor takes only to low water mark, the ownership of the bed of the river remaining in the state.

Morrill v. St. Anthony Falls Water Power Co., 26 Minn. 222.

Hanford v. St. Paul & Duluth R. R. Co., 43 Minn. 111-112.

Union Depot Co. v. Brunswick, 31 Minn. 301.

The interruption of navigation in the vicinity of St. Anthony Falls does not take away the navigable character of the stream; for a river navigable in its general character does not change its legal characteristics by a disturbance which at a given point, breaks the continuity of the actual navigation.

Matter of State Reservation at Niagara, 37 Hun. (N. Y.) 537.

This appears to be so well settled, and the reasons for it so conclusive, based as they are on the ordinance of 1787, the public acts of congress, and the course of the government in the public surveys that when we add to all this the actual fact of the navigability of the river for logs, at least at St. Anthony Falls (*Lamprey v. Metcalf*, 53 N. W. 1143), that it is with some surprise we note the contention of the plaintiffs to the contrary. If half a mile of the river near plaintiffs property were to be held not navigable (as they contend it should be) we must hold all the river above that point to be non-navigable or else chop it up into small parts varying with the depth of the water or the rocks in the channel, holding this to be navigable and that not; the public to have a right to fish here and not there—all which leads us to believe that plaintiffs claim in this respect is not meant to be serious.

While it is true that there can be no absolute property, in particular water, considered as so many drops or gallons, because it is fleeting, runs away, turns to vapor and falls again elsewhere, yet the usufructuary right in water amounts to the same thing as ownership of it whenever such right exists; the water flowing out is constantly replaced by other flowing in, and the body of water existing in a certain place, whether it consists of the same particles or not, is subject to all the uses which ownership of it could give were it the subject of ownership. So we frequently see it stated that ownership of a bed of a stream gives ownership of the water above it.

So Davies, judge, in *People v. Canal Appraisers*, 33 N. Y., says: "The title to the land or bed of the river

undeniably carried with it the water that flowed over it."

We think that it is a vital point of distinction in the case at bar, that the state owns the bed of the river, and therefore has a paramount right to the use of the water for public purposes. Plaintiffs contest this, and say that this involves a claim that the state holds by a double sort of title, a *jus privatum*, as well as *jus publicum*, and cited in the court below, Bradshaw v. Duluth Imperial Co., 52 Minn. 59, to the effect that the *jus privatum* or right of private property in navigable waters and their shores claimed by the crown, which it could alienate to a subject, has no place in the jurisprudence of this state; that the rights of the state in navigable waters and their beds are sovereign, and are held in trust for the public as a highway and incapable of alienation.

We have never claimed that the *jus privatum* distinct from the *jus publicum* existed, or that the rights of the city in the cases at bar are at all dependent on it, and we repudiate any such position. It is well to bear the point in mind, however, as plaintiffs must appeal to the doctrine of *jus privatum* to sustain any claim of water right based on the existence of their dams on the property of the state. We do contend, however, that the *jus publicum* is much broader than the mere right to navigate a river.

The real question at issue is what is involved in the term "riparian right." If the property in the bed of the stream gives the state certain rights which plain-

tiffs as "riparian" owners merely do not have it matters not to them, when seeking to enforce only their "riparian rights," what the state has seen fit to do with its rights as owner of the river bed.

What, then, are "riparian" rights, and what rights are appurtenant to ownership of the bed? "Riparian" rights attach to the bank as distinguished from the bed.

Gould on Waters, section 148.

Are all rights in a navigable river "riparian" rights except the mere right of passage up and down the stream, as plaintiffs would have it believed? For instance, they have said: "The right to which the riparian owner's property is said to be subject is simply the sovereign right of the state to control the use of the waters for navigation." Also "With the ownership of the land go the riparian rights, and subject to the right which the state has, these riparian rights include the right to use the water for manufacturing purposes in connection with whatever faculties the riparian owner may construct for the purpose of utilizing the water to its full extent."

Defining a riparian right as a right which appertains exclusively to the ownership of the bank as distinct from the bed of the river, what sort of a right is that of fishing? "Does the exclusive right to fish arise from ownership of the bank?" It certainly does not; for it is confined to those cases where the owner of the bank owns the bed also, and in the case of opposite owners each owner is confined to the side of the stream

on which his land lies. When the state owns the bed the right of fishing is common to the public because the state holds in a sovereign capacity and in trust for the public. There is no strict *jus privatum* here, nevertheless a right exists in the public to fish opposite the riparian owner's land, and the latter's right to fish is not "riparian," but only a right to fish in common with the state's citizens because he is one of them. Because the *jus privatum* or exclusive proprietorship of the state in the fisheries apart from its trust for the public is not law, it does not follow that the "riparian" owner gets the right to fish with others because of his riparian land. He has no riparian right of fishing. When the exclusive, personal right of fishery in the crown or its grantees faded away, the public, not the "riparian" owner stepped in.

Taking the case of a non-navigable stream, where the exclusive right of fishing is in the owner of the bank, we must say that he has the right as owner of the bed of the stream, and not as a "riparian" right, unless we are prepared to depart from our definition of a "riparian" right as one attaching to ownership of the bank as distinguished from ownership of the bed. Let us not confuse the word when applying the decisions of other cases, or rather, let us discover the sense in which it is used. So with the right to maintain structures in the bed of the river. Is that a "riparian" right or does it follow from ownership of the bed? There is a class of cases which hold that, inasmuch as the state owns the land below high or low water mark, as the case may be, that it can authorize the placing of structures

in front of the riparian owner and beyond the limits of his fee, without compensation to him.

Gould v. Hudson River R. R. Co., 6 N. Y. 522.

McManus v. Carmichael, 3 Ia. 1.

Tomlin v. Dubuque, B. & M. R. R. Co., 32 Ia. 107.

That doctrine is not the law in Minnesota (*Union Depot v. Brunswick*, 31 Minn. 300), but the reasoning of those cases is conclusive that the state has the exclusive control of the bed of the stream, and the only modifications of the doctrine, in this state or any other, is that the right of *access* to the water is a "riparian" right, and as far as the point of navigability "the riparian" owner may build structures, or make a fill in the water, for the purpose of reaching the water when it is navigable, and for that reason only, and because such right is incidental to access to the stream is the doctrine of the cases above cited modified. We feel safe in saying that apart from such modification the doctrine of those cases should be sustained. They have been in effect, though not specifically by the Supreme Court of Minnesota. (*Union Depot v. Brunswick*, 31 Minn. 300.) And although the right of the bank owner may have been called "riparian," it seems plain that it is not "riparian" in its true sense, but only in the sense that it is a necessary means to protect a true "riparian" right, viz., the exclusive right to land on or embark from one's own shore land.

A structure then beyond the point of navigability cannot be maintained as a "riparian" right. Unless licensed it is a "purpresture," and if an obstruction to navigation, both a purpresture and a public nuisance.

Union Depot v. Brunswick, 31 Minn. 300.

But take the case of a non-navigable stream. The bank owner can build a dam to the center of the stream or clear across if he owns both sides, and provided he does not overflow other than his own land no one can say him nay. Is this a "riparian" right, or does it proceed from ownership of the bed of the stream?

Again, the cutting of ice on a river or pond is a public right or a private right, according as the public or bank owner holds the fee of the bed of the stream.

In Massachusetts the right to cut ice on the great ponds is common; but the great ponds belong to the state by early colonial enactment.

Gould on Waters, section 191.

The owners of the land bordering on navigable streams in those states where they are held to be public property have no title to the ice which forms on such streams, as incident to the ownership of the banks, but the ice belongs to the first appropriator.

Wood v. Fowler, 26 Kan. 682.

Hickey v. Hazard, 3 Mo. App. 480.

Ice forming on a navigable fresh water stream, the bed of which belongs to the riparian proprietors, is their property.

Washington Ice Co. v. Shortall, 101 Ill. 46.

(In Illinois the riparian owner takes the fee to the middle of the Mississippi river.) Ice forming on private fresh water streams and ponds belongs exclusively to the riparian proprietors, who may prevent its re-

moval by others or maintain trespass against those who cut it without license.

Mill River Manfg. Co. v. Smith, 34 Conn. 462.

Edgerton v. Huff, 26 Ind. 35.

State v. Pottmeyer, 33 Ind. 402.

Lorman v. Benson, 8 Mich. 18.

Payne v. Woods, 108 Mass. 173.

These cases make it clear that the right to the ice depends on the ownership of the bed of the stream. If the public owns the bed the right is common; if the bank owner happens to own the bed his right to the ice is exclusive. The right to cut ice, therefore, is not riparian.

It will thus be seen that "riparian" rights, properly so called, are limited, and that independently of the rights acquired by virtue of the ownership of the bed of the stream are merely the right of access to the water, and the right that water should flow past the riparian land. Since the public right of navigation has been the one most in question in the decided cases it has been too much the habit to use language leading to the inference that the public right is restricted to that of passage or navigation, while every other possible use of the water passes to the "riparian" proprietor.

But, analyzing each water right by itself, the "riparian" rights which the bank owner can call upon the law to vindicate, at least against the state and its public agencies, seem confined to the two mentioned.

Diedrich v. N. W. U. Ry. Co., 42 Wis. 248.

Delaplaine v. C. & N. Ry. Co., 42 Wis. 214.

Especially in construing the New York decisions must it be borne in mind that the riparian proprietors own the bed of the stream, with the possible exception of the Mohawk and Hudson rivers, so that about the only rights left in the public outside of these two rivers are the rights resulting from the public right of navigation and its right to protect and improve the water highways.

In the cases of the *Canal Appraisers v. People*, 17 Wendell, 571, and *People v. Canal Appraisers*, 33 N. Y. 461, the right of the state to divert water from the Hudson and Mohawk rivers for supplying the Erie canal without compensation to riparian owners, whose water power was affected was distinctly affirmed on the ground that these rivers should be deemed navigable and the waters public waters, and that the right of a riparian owner to the use of the water was subordinate to the paramount right of the public to take it for public use. The body of the decision in each case is devoted to proving that these rivers are navigable, and it is assumed throughout that such being the case the waters are the state's and applicable to public uses regardless of riparian rights.

Plaintiffs in the cases at bar lay great stress on the case of *Smith et al. v. City of Rochester*, 92 N. Y. 463, as being one almost entirely parallel. In that case the city of Rochester was authorized to take water for city purposes from Hemlock lake, out of which flowed Henoye creek. The plaintiff utilized a water power on the latter which would be injured by the taking of water from the lake. The lake bed was owned by the

riparian proprietors, and, of course, the bed of the creek was private property. These waters lay in that part of New York which was originally claimed by the state of Massachusetts, which had granted the lands to private parties. Later, the state of New York, to settle the dispute, recognized the right of grantees from the state of Massachusetts, but reserved the rights of public use of the waters. The court held that the grantees from Massachusetts acquired the fee to all the land, including the bed of the lake and the use of its waters, and that the right reserved to the state of New York was only the right of passage for navigation. That this mere right of passage being the only right acquired by New York state, it would be inconsistent with such limited right to hold that it could divert the waters. The doctrine of that case is to be read in the light of these facts ,and it will appear that it has no general application to navigable waters where the rights of bank owners are limited to those which are strictly riparian. In addition to this the plaintiff in that case had his water power on a private stream, running out of the lake, and his rights in it were proprietary as well as riparian rights. So there is really no parallel between that case and the one at bar.

Plaintiffs have also claimed that the case of *Sweet v. City of Syracuse*, 129 N. Y. 316, sustain their position. But the rights of private owners did not come into the case. The legislature had passed an act to establish and maintain a water department in and for the city of Syracuse, which was authorized for and in the name of the city to acquire, construct, maintain,

control and operate a system of water works to furnish the city and its inhabitants with water from Skaneateles lake, and to acquire all lands, waters and other property necessary for this purpose. The power to exercise the right of eminent domain was conferred and the procedure provided for. Skaneateles lake was 17 miles from Syracuse, and is a body of water 15 miles long and 1 mile wide. It is 453 feet above the Jordan level of the Erie canal, and discharges its water through an outlet known as Skaneateles creek, about 10 miles long, into the Seneca river, thence into the Oswego river, thence into Lake Ontario. The lake has been navigated by steamboats and other crafts, but there is no navigable communication between it and any other waters. The state has acquired the right to the use of the waters of the lake as a feeder to the Erie canal, and by the act in question authorized the city of Syracuse to take the surplus waters of the lake not needed for the use of the canal. The only material question in the case was whether in so doing the state had violated the constitutional provisions that the legislature shall not sell, lease or otherwise dispose of the Erie and certain other canals, but they shall remain the property of the state and under its management forever. That was the only seriously contested point in the case. It is not a fact, as has been claimed by plaintiff in the case at bar, that the court passed on the rights of riparian owners as against the City of Syracuse; it is merely held that if the city became a riparian owner and should put a pipe under the water for the purpose of drawing off such surplus water the pro-

prietary ownership of the state would not be infringed within the constitutional prohibition above quoted.

Neither does the case of Rumsey vs. N. Y. and N. E. R. Co., 133 N. Y. 79 lay down the rule that the state cannot divert the waters from their natural channel for any purpose without providing compensation. That question was not before the Court, and was not referred to. The thing decided was that a riparian owner is entitled to access to the water which cannot be cut off by running a railroad embankment between the upland and the water front, in this respect overruling Gould vs. Railroad Co., 6 N. Y. 522, and conforming to the doctrine of the Supreme Court of Minnesota in Union Depot Co vs. Brunswick, 31 Minn. 300, and Brisbine vs. Railroad Co., 23 Minn. 114. The Court say:

"It may be conceded that the sovereign power in a work for the improvement of the navigation of a public river may incidentally interfere with the enjoyment and use of the water front by riparian owners, but the power to grant to a private individual or corporation the right to cut such owner off entirely from communication with the stream without compensation is quite another and different question."

The case of Yates vs. Milwaukee, 10 Wall. 497, goes no further and decides no other question than the right of access by a riparian owner to the water.

The case of Commissioners of Canal Fund against Kempshall, 26 Wend. 404, has been so often quoted as affecting the ruling in Canal Appraisers vs. The People, 17 Wend. 571, that it is deserving of an extended

review. We maintain that the whole tenor of the argument in that case supports the position that proprietorship of the bed of a stream gives the right to an unqualified use of the water power, and that the whole contention of the opinion is to show that the property owner whose rights were in question was the owner of the bed of the Genesee river. We call particular attention to the statement of facts on pages 401 and 405 of the report which shows the river in controversy was situated in that district of New York where the land was ceded by New York to Massachusetts, reserving only the right and title of government, sovereignty and jurisdiction. It was this state of facts which determined the Court in *Smith vs. Rochester*, 92 N. Y. 492, cited above to hold that the bed of the lake there in question was held by the owners of the bank. The opinion in the Kempshall case proceeds to state the doctrine laid down by Lord Hale as to fresh and salt water rivers, and to show that even where the public might have acquired an easement for passage or transportation on the larger fresh water streams the riparian owner's right of proprietorship in the bed of the stream with the right flowing therefrom was not affected. It is there shown that the common law rule that non-tidal rivers were private as to all proprietary interests was still the law of New York, and that the case in 17 Wendell, 571, was confined in its operation to the Hudson and Mohawk rivers, which might be well held, it was said, to be public rivers on account of the original patent from the Dutch government, which would be governed by the civil law as to water rights, and on account of the undisputed claim of the

state and colony for a century to the exclusive use of those two rivers for public uses. The decision then goes on to the effect that, except as to the Mohawk and Hudson rivers, the common law must be held to prevail in New York, and as to ownership of the bed of the Genesee river. It is there said by Senator Verplank, p. 418:

"I am, therefore, of the opinion that by the common law still remaining the unrepealed law of this state, the legal title to the portion of the Genesee river where the waters were temporarily diverted by the construction of the aqueduct, was in the proprietor of the adjacent banks, subject only to the uses of navigation so far as those waters were capable of it, and to the rights of other proprietors, above or below, to the use of the stream. The complete right to the usufruct and enjoyment of those waters for milling, or any other purpose to which water or its mechanical power is applicable is appurtenant to the ownership of the soil and banks."

He then says that, even conceding that the Genesee were on a par with the Hudson river still "under the compact of 1786, which settled the long controversy between New York and Massachusetts, concerning the title to a large part of Western New York, this state, by formal deed, ceded, granted, released and confirmed to Massachusetts all the estate, right, title and property (the right of government, sovereignty and jurisdiction excepted) which the former had to a large territory, comprising the whole tract of country through which the Genesee runs, from its source to where it flows into Lake Ontario. By a legislative act of Mas-

sachusetts the territory was in 1778 granted to Phelps and Gorham, and became in every sense private property. By the very letter of the compact and grant the whole bed of the Genesee passed as so much land under water, comprehended in the granted territory. The usufruct of water flowing over it is a part of and incident to the fee. There was no exception or saving in the grant, except that of government, sovereignty and jurisdiction. \* \* \* Under this original grant is shown to a regular chain of title in the defendant to certain lots in that tract, bounded in express words on one side by the center of the Genesee, and including land on the adjoining banks."

It thus appears that in so far as the state has rights by virtue of its ownership of the bed of the river, the Kempshall case has no application to those at bar other than to affirm that right of user follows such ownership. The case of Garwood vs. N. Y. Cent. R. R. Co., 83 N. Y. 400, was a controversy between private riparian owners; no question of public use was involved.

In Chenango Bridge Co. vs. Page, et al., 83 N. Y. 178, the property owner held the fee of the river, the only public right being the easement (in New York) of navigation. In this case it is held a private owner holding the fee of the bed of the river may maintain a ferry for his private use in spite of legislative prohibition.

In Meyer vs. City of St. Louis, 8 Mo. Appeals, 266, the City of St. Louis had extended a dike at right angles with the river out 700 feet from shore for use merely as a public street, and thus caused the river to

fill up in front of plaintiff's mill property near the dike, whereby the water became so shallow that he had no access to the river, and his lumber and logs were buried in soft mud. Held, he was entitled to damages.

The Wisconsin cases have no possible bearing here.

In Walker vs. Board of Public Works, 16 Ohio, 540, 544, it is held that the bank owner by the laws of Ohio holds the fee of the bed of the river, and the public has only an easement of passage.

In the case of Piop, 14 L. R. App. Cases, 612, the only question was the right of free access of a riparian owner to the water. It was held that a railroad company could not put a railroad embankment across the water front without compensation to the riparian owner. This was the only riparian right discussed.

Having shown that in New York the ownership of the bed of fresh water rivers, except the Mowhawk and Hudson have, in many cases, been held to belong to the individual and not the state, and that in such case the state there has but a limited easement for passage and transportation, but that as to the Mowhawk and Hudson the public rights are paramount, we will review the case of Black River Improvement Co. vs. La Crosse, 54 Wis. 659.

The Black River Improvement Company was a corporation created by special act of the Wisconsin legislature in 1864, as amended in 1866. In their charter it is provided that this company shall have power and authority to improve the navigation of the Black river and lakes near the mouth of the same, in the Counties

of Clark, Jackson, Trempealeau and La Crosse in Wisconsin by "removing obstructions, building dams, breaking jams, deepening, widening and straightening the channel, closing up chutes and side cuts leading from said river into the Mississippi river and into the bottom lands of said river and into sloughs; to erect dams and piers, to construct levees and dikes, and repair and straighten the banks of said Black river, etc." The defendant, the La Crosse Booming and Transportation Co., was organized under an act of the Legislature in 1872 for manufacturing by steam or water power lumber and wood products and sell the same; also for the purpose of "improving Black river and sloughs for navigation from John Lytle's mill on said river to its mouth and entrance into the Mississippi river by way of the main river and Black Snake river and French slough, for the purpose of booming, driving, rafting, holding and manufacturing logs, timber and other wooden materials for the use of the company or of other persons, \* \* \* also of transporting property of all kinds on the Mississippi river and tributaries by vessels and water craft, and to purchase and charter all necessary vessels for towing purposes as common carriers or otherwise upon the Mississippi river or its tributaries, and to charge a reasonable compensation therefor for all booming, rafting, manufacturing, transferring and towing, or other services for other persons, and with power to construct such improvements in said streams by way of improving the navigation of the same, and of such booms, piers, piles, assorting works, rafting works, holding grounds for

materials and purchasing and leasing such real estate as said company may need.

The controversy in the case arose out of defendant's attempt to keep open and improve for purposes of navigation what is called in their articles Black Snake river. Black Snake river is in the United States surveys called the West Branch and is, in fact, a part of the waters of the Black river. The Black Snake leaves Black river at a point below Lytle's mill and runs to the west of the main channel of the Black river through low grounds for two miles and then empties into Rice lake. The main channel bears to the east and empties into the same lake. From the lake to the Mississippi in ordinary stages of water all the waters of Black river flow in one stream to the Mississippi. West Branch or Black Snake river was returned as a meandered stream by the United States surveys from where it leaves Black river to Rice lake, and in its original state was useful for running logs, as deep or deeper than the main channel, but not so wide, and more tortuous.

The plaintiff's corporation, as soon as organized and before 1866, closed up the Black Snake river at its upper end where it left the Black river in order to throw more water into the Black river main channel and built a dike or embankment from the mouth of the Black Snake north for half a mile or more, in order more effectually to prevent water from flowing into the Black Snake. The defendant, in 1876, broke down this dike in order to allow the waters to flow into the Black Snake the same as originally.

The questions arising from the case are two: First,

had plaintiff the right under its charter to close up the Black Snake for the purpose of turning its waters into the main channel for the purpose of improving that channel? Second, was it lawful for such purpose without first making compensation to the riparian owners along the line of the Black Snake for any injury they might sustain by the diversion of its waters from its natural course into the main channel?

The Court hold that the terms of the charter authorize the closing of the Black Snake. After citing the canal cases in New York and many others the opinion says:

"These cases and many others hold the doctrine that the waters in a navigable river, or other navigable body of water, are so far the property of the state that the state may control them for public purposes in their flow or otherwise, without making compensation to the riparian owners upon the borders of such streams or bodies of water. The flowing waters in such streams are public highways, and such waterways are as much subject to the control of the state for the purposes of the improvement of such ways as a highway upon the land. The right of the public to raise or lower the grading of the public street without being required to compensate the adjacent owners is well established by the decisions of this court, and the right to discontinue a highway has always been recognized by the law. The right of the riparian owner to have the water of a navigable stream flow past his lands adjoining the same as they were accustomed to flow is as perfect against everybody except the state or some

person or corporation standing in its stead, as it is in the case of unnavigable streams, and that right does not, as this court has decided, depend upon his ownership of the soil under the water, but upon his riparian ownership, and the right of the state to control the waters of such streams in the public interest is the same whether the ownership of the soil under the water be in the state or in the riparian owner. The doctrine of the case above cited has, we think, been fully adopted by this court in all cases where the interference with the waters of a navigable stream has been for the improvement of the navigation thereof. Whether this court has decided or will decide that the state may, for any and all public purposes, interfere with the waters of a navigable stream, whereby injury may result to the riparian owner without making compensation therefor, need not be determined in this case. The plaintiff represents the state for the purpose of improving the navigation of the Black river, and what they have done under their charter, and which is complained of the defendant, we think must, for the purposes of this action, be considered to have been done for the improvement of navigation in said river, and as against the state, or the plaintiff acting in its stead, we think this court has determined that the riparian owners of the banks of the Black river or the Black Snake river have not the absolute right to have the waters of said river flow as they were accustomed to flow in front of or through their land."

The full force of this decision is apparent when it is stated that in Wisconsin the riparian owners on navigable streams own the bed of the stream as well.

It has been held in a long series of decisions in Pennsylvania that the public right of the state in the waters of the navigable rivers is paramount, and as against the state a diversion of the water for public improvements is *damnum absque injuria*. Rundle vs. Delaware & Raritan Canal Co., 14 How. 80; Susquehanna Canal Co. vs. Wright, 9 Watts. & S. 101; Monongahela Nav. Co. vs. Coone, 6. W. & S. (Pa.) 101.

In Fay vs. Salem & Danvers Aqueduct Co., 111 Mass. 27, it was held that the waters of a public pond might be diverted to supply a town without compensation to the shore owners, on the ground that the state owned the waters.

In Commissioners vs. Withers, 29 Miss. 21, it is held that the rule of the common law is not applicable to our large public rivers used for navigation, but that the rights of the owners of the lands bounded by such streams are subordinate to the right and power of the state to use and appropriate the waters to the public good in promotion of navigation.

In Lamprey vs. State, 53 Minn. 181, the Court, after holding that the riparian owner takes the fee only to the water line of a navigation lake, says: "Many, if not the most, of the meandered lakes of this state are not adapted to, and probably will never be used to any great extent for commercial navigation, but they are used—and as population increases and towns and cities are built up in their vicinity will be still more used—by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agri-

cultural and even city purposes, cutting ice and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated. When the colony of Massachusetts, 250 years ago, reserved to public use her great ponds, probably only fishing and fowling were in mind; but, as is said in one case, 'with the growth of the community, and its progress in the arts, these public reservations, at first set apart with reference to certain special uses only, became capable of many others, which are within the design and intent of the appropriation. The devotion to public use is sufficiently broad to include them all as they arise.' *West Roxbury vs. Stoddard*, 7 Allen 158. If the term 'navigable' is not capable of a sufficiently extended meaning to preserve and protect the rights of the people to all beneficial public uses of these inland lakes, to which they are capable of being put, we are not prepared to say that it would not be justifiable, within the principles of the common law, to discard the old nomenclature and adopt the classification of public waters and private waters."

In *People vs. Tibbetts*, 19 N. Y. 523, it is said: "It is beyond dispute that the state is the absolute owner of the navigable rivers within its borders, and that as such owner, it can dispose of them to the exclusion of the riparian owners."

If it be thought that this decision goes too far in authorizing a private individual to be the beneficiary of the grant, the case is still good as authority that the

state has the paramount right of user for all public purposes.

As bearing out the same doctrine, we cite the case of *Tomlin vs. Dubuque B. & M. R. R. Co.* 32 Ia. 107.

We thus see from a review of the cases that there is ample authority for holding that riparian rights to use of the water are subordinate to a use of such waters by the state for public purposes of navigation, though such use results in or is best secured by a diversion of the water from its natural course in the stream; that this doctrine holds without question where the state owns the bed of the stream, and in Wisconsin even where the bed is held by the riparian owner. If this riparian right attaching to the bank is thus subordinate to the right of the state to divert it for the public purpose of improving navigation, why on principle should it not be subordinate to any other public use? The paramount rights of public user once admitted for any purpose, what reason can be assigned for limiting the uses, provided they are public and for the common and beneficial use of the people? For whence the paramount public right at all? The question could scarcely have arisen at common law, for it is not easy to conceive of diverting the water from an arm of the sea, with the whole ocean to supply it. But it seems, on principle, that ownership of the land under the water must have given the royal right of usufruct to all the water over it, paramount even to exclusion if need be, on the same theory that it gave the exclusive right to maintain structures thereon for the public use or the exclusive right of fishing or ice

cutting. Though the *jus privatum* of the state is controlled by the *jus publicum* it remains nevertheless the proprietary right of the state, the only difference being that it is a right held in trust for all the public and incapable of alienation for private purposes or to private persons. (Gould on Waters, Sec. 17-21.) The extent of the right of property in the state never changed, though the power of the state to alienate it or to use it except for the public has since been taken away. In that sense the proprietary right has merged into the sovereign right. If the crown had ever a paramount right of usufruct, the state has it still; and if it has such right for any purpose, it must be a general paramount right for all purely public uses.

Though it has been said that the riparian right of user of water flowing past the bank is derived from ownership of the bank as distinguished from the bed, yet the bed and the bank may be in different owners, and even a riparian owner holding the bed as well as the bank may severally grant the bed; and in either of these cases has it ever been held that the usufruct of the water did not vest in the proprietor of the bed as well as the owner of the bank? Has it ever been pretended that since a "riparian" owner has a right of usufruct in the water, it is exclusive, and that the same right does not attach to the owner of the bed of the stream by virtue of his proprietorship of the bed? Is not the ownership of the land under the water an independent source of title to usufruct of water, as independent as that attached to the bank? Is it not even the original source? The general definition of

land includes everything above or below, including water. 2 Blackstone Com. 18; 1 Washburn Real Property; McManus vs. Carmichael, 3 Iowa 29. So ice forming in the stream belongs to the owner of the bed. State vs. Pottmeyer, 33 Ind. 402; Wood vs. Fowler, 26 Kan. 682; Hickey vs. Hazard, 3 Mo. App. 480. And when the state, the primary source of title, retains its ownership of the bed of a river, and sells land bordering on it with usufruct of the water as incident thereto, does not the state by virtue of its sovereignty retain the paramount right to use the water for all public purposes, and is not the usufruct incident to the riparian land inferior to this? Such interests in public waters as may be of general use to the public the state cannot grant away. Illinois vs. Illinois Central R. R. Co., 146 U. S. 387. This does not at all militate against the doctrine that as between private parties the rights of the bank owner are property, and cannot be infringed upon, nor as against the right to compensation in condemnation proceedings for this riparian right when the *riparian land* is taken for other uses; for except as against the paramount right of the state to use and divert the water for public purposes, the riparian right of user remains as property, analogous to a base fee in land, which is valuable and must be paid for.

So it seems clear that the plaintiffs claim, that the sovereign right of the state in the Mississippi river is merely that of the right to navigate, is unfounded; that to sustain such a position, it must be based on the theory that the state has not original property in

the waters to the fullest extent that they are capable of ownership, but only a limited easement or servitude imposed on the fuller property in another; and herein is the fault of their argument. For the state owns the bed of the river and the full property in its waters, and is not confined to mere exercise of sovereignty and jurisdiction, as in the case of those New York waters ceded to Massachusetts and its grantees. The trouble lies in not distinguishing cases where the bank owner also owns the bed, and where such ownerships are separate.

We submit, therefore, that we have demonstrated our proposition, that the state has the paramount right to divert the water of the Mississippi for public uses, without compensation to riparian owners.

## II.

Plaintiffs maintain the mill dams in question only by license from the state, and their claim of injury depends upon alleged property rights arising solely and resting absolutely upon the maintenance of their dams. This right is but a license, revocable at any time by the state, and in so far as water power depends on it, it has been revoked by the dedication of the part of the water to the public use of the citizens of St. Paul.

Heretofore we have discussed the affirmative paramount right of the state to divert water from plaintiffs mill power for public use, assuming that they had ordinarily an absolute right to the use of the water secured by their dams. But plaintiffs have no such rights. It is conceded that the ordinary flow of the

river past plaintiffs' property is not affected, on a liberal estimate, more than one-sixteenth of an inch in depth at any time, which is inappreciable to the eye, and that, too, based on the assumption that drawing ten million gallons a day from a water area of sixteen thousand acres (Record, folio 42) immediately abstracts that amount from the Rice creek outlet, and therefore from the Mississippi river. So that it may be justly said that there is no real diminution in the flow of the river. But by means of dams extending entirely across the river, plaintiffs have contrived to seal up all the water in the river at certain seasons of the year, and turn it into one main canal, thence through the mills and out again into the channel below, through tail races, where it is measured by wiers; and in this manner they claim, with the aid of the mathematics of their expert engineers, to be able to give an assignable money value in potential water power to every gallon or pailful of water passing down the stream. They have brought under their absolute control the free waters of the greatest thoroughfare of the continent. At their Midas touch its waters turn to gold, and when the inhabitants of a large city near by slake their thirst from one of the little tributaries of the great stream these plaintiffs think they see the gold eagles, wont to be theirs, stolen from their grasp. Whence their exclusive title to this source of wealth, that even the state cannot claim its own? It is by virtue of their little strip of land fronting the river part of the way, and of their easement of flowage over the land higher up the stream, opposite the dams, but owned by others; so they claim. But

they have forgotten if ever so narrow a breach is made in these dams in the middle of the stream, all this water power so valuable to them flees away in a moment, and that the loosened waters seeking their own level would then soon "run as they were wont to run." The state owns the bed of the river in its sovereign character for public uses, and for public uses only. It cannot grant this away for private purposes any more than it can abdicate its sovereignty. On the general doctrine applicable to this we quote at length from the recent case of Illinois Central Railroad Company vs. State of Illinois, 13 Supreme Court Reporter, page 118, and generally known as the 'Chicago Water Front Case.'

"That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water by the common law, we have already shown; and that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them, may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the state may grant parcels of the submerged lands, and so long as their disposition is made for such

purpose, no valid objections can be made to the grants. It is grants or parcels of lands under navigable waters that may afford foundations for wharves, piers, docks and other structures in the aid of commerce, and grants of parcels which being occupied do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases

can be reconciled. General language sometimes found in opinions of the courts expressive of absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power, and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government, the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state."

We thus see clearly the source of plaintiffs water

power, for injury to which they claim damages. The power could not exist except for the dams as now constructed; the dams could not exist except by grant from the state; the state cannot grant such right to the exclusion of other public uses, and may, at all events, revoke the license or permission at any time. The state may order out the dams to-morrow, and the plaintiffs could not complain. They have positively no right to maintain these structures beyond the point of navigability, or as against a public use proposed to be made by the state, at all. Under this doctrine plaintiffs' charter (Special Laws 1856, Chapters 137 and 145) are merely revocable licenses as to the dams. There is no right, then, as against the state, or its representatives, the defendant in the case at bar, which plaintiffs have, or ever had; for, with their dams gone, there is no riparian right affected by the diversion of the water. The water would flow as before; and, with ever so narrow a channel in the middle of the river, any side dams would be of no avail for power. It logically follows from this that plaintiffs have no cause of action against the defendant.

It seems to us that this position proves itself. There is, however, a further and direct authority for it in the case of *Union Depot Co. vs. Brunswick*, 31 Minn. 300. The Supreme Court of Minnesota there say:

"At common law, the king, as representative of the nation, held in trust for them all navigable waters and the title to the soil under them. This was a sovereign or prerogative, and not a proprietary right. At the revolution, the people of each state became sovereign, and in that capacity held all these navigable wa-

ters and the soil under them for their common use, subject only to the rights since surrendered to the general government. *Martin vs. Waddell*, 16 Pet. 367; *Mumford vs. Wardell*, 6 Wall. 436. New states since admitted have the same rights in these navigable waters as the original states. Upon the admission of a new state, this right of eminent domain in them, which was temporarily held by the United States passes to the state. The patent from the United States of land on a navigable stream conveys to the patentee no title to the bed of the stream. This rests in the state as a sovereign right. *Pollard v. Hagan*, 3 How. 212, 222; *Mumford v. Waddell*, *supra*. \* \* \* In this state it is the settled doctrine that the riparian owner has the fee to a low water mark. *Schurmeier v. St. Paul & Pacific Ry. Co.*, 10 Minn. 59 (82); *Brisbine v. St. Paul & Sioux City Ry. Co.*, 23 Minn. 114. But while he only has the fee to low water mark, he has certain riparian rights incident to the ownership of real estate bordering upon a navigable stream. Among these are the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain suitable landing piers and wharves on and in front of his land, and to extend the same therefrom into the river to the point of navigability, even beyond low water mark, and to this extent exclusively to occupy, for such and like purposes, the bed of the stream, subordinate only to the paramount public right of navigation. *Dutton v. Strong*, 1 Black, 22; *Railroad Co. v. Schurmeier*, 7 Wall. 272; *Yates v. Milwaukee*, 10 Wall. 497; *Rippe v. Chicago, D. & M. Ry. Co.*, 23 Minn. 18; *Brisbine v. St. Paul & Sioux City*

Ry. Co., *supra*. These riparian rights are property and cannot be taken away without paying just compensation therefor. The state could not do it or authorize any one else to do it. *Yates v. Milwaukee*, *supra*; *Lyon v. Fishmongers' Co.*, L. R., 1 App. Cases, 662; *Brisbane v. St. Paul & Sioux City Ry. Co.*, *supra*.

"The term 'point of navigability' as used in the cases referred to is not perhaps capable of a fixed definition. Its meaning and application must vary with and depend upon circumstances. It is not to be understood in the narrow sense of being limited to that point where the water of the stream may be navigable for some purposes at certain stages of water. When it is said that a riparian owner may construct landings, etc., to the point of navigability, it must be understood as giving him the right to do so to the extent necessary to make his abutting property reasonably available at any ordinary stage of water, for any kind of navigation for which the stream is used, or for which it is adapted, provided, of course, it does not obstruct the paramount rights of the public. It must have reference not only to an ordinarily low stage of water, but also the size and kind of vessels which navigate the stream, and the kind of business done upon it. \* \* \*

"Suppose, however, a riparian owner has unlawfully intruded into the water beyond the point of navigability as above defined, and filled up the bed of the stream beyond the point of navigability as above defined, and filled up the bed of the stream beyond that point, for the sole purpose of extending his possessions, and so as to obstruct and interfere with the public right of navigation. This would constitute a purpresture. The

public would have a right to abate it as a public nuisance. It would give no rights to the person who made it. It would not forfeit or destroy his riparian rights as they existed before, but he could claim no additional rights on account of it. When it is proposed to take his property for public use by the exercise of eminent domain, he can claim no additional compensation by reason of it. When condemned or taken, the corporation which acquired it would presumably have to remove it,—at least, there is no presumption that it would be allowed to remain—and therefore there is no reason why the party condemning the property should pay more for it on account of his unlawful encroachment upon public rights. The mere chance that it might be allowed to remain, cannot be made the basis of compensation to the person who made it."

### III.

It will be noticed that plaintiffs' dam is not only in the river opposite their own land, but opposite land not owned by them for a distance of 650 to 900 feet up the river. (Record, folios 72-73 and 61-62.) For a length of 650 to 900 feet below the apex of the dams the companies have only the right of flowage on either bank.

They cannot, therefore, justify their claim to own all this water power, even granting them a right to dam up the stream entirely. The power depends largely on the head of the water, and on having the dam extend as far up the stream as possible. On no theory of riparian right can a structure extend into a stream

above or below the property owned by the riparian proprietor, and form a basis for a water power right in such proprietor, and a servitude on property higher up the stream. The mere right of flowage, or right to back water on to the upper land, would not confer this. So it would seem that license from the state must be the only ground which plaintiffs, even on their own theories, can urge in support of the upper 650 to 900 feet of the dam. Their water power is indivisible, and, if the main part of their structure is unlawful, or not the foundation of a riparian right in them, plaintiffs must fail for this reason also.

#### IV.

The right of the state is sovereign, not proprietary, as plaintiffs claim. Therefore, the state granted no property rights in the bed of the stream to plaintiffs, nor does the state attempt to grant such right to defendant. The state merely permitted plaintiffs to use the bed of the Mississippi river, with its incidental privileges, until it saw fit to limit these privileges by using them for itself. Defendant is not a grantee but a part of the state itself.

The above propositions are mainly covered by the argument under subdivision II. The board of water commissioners exist by virtue of the special laws referred to in the statement of the case. By those acts it appears that the board of water commissioners is only an executive board for the purpose of supplying water to the inhabitants of the city of St. Paul. Its members are appointed by the mayor; their salary is

paid by the city; the city engineer is ex-officio engineer of the board, and all bonds issued for the water works system under their supervision are bonds of the city of St. Paul.

Morton v. Power, 33 Minn. 521.

The water board's powers are for the benefit of the public, and it is a state agency on par with the board of health or fire department or police department, whose members are paid by the city. There seems to be no reason why the decision of Bryant v. City of St. Paul, 33 Minn. 289, and Grube v. City of St. Paul, 34 Minn. 402, should not likewise apply to the water board.

Snyder v. City of St. Paul, 51 Minn. 466; Dillon, Minn. Corp., Section 779.

The board of water commissioners are not authorized to charge water rates greater than is sufficient to defray the cost of the works and expenses. See. 31 Ch. 110, Sp. L. 1885.

Taking Bailey v. Mayor, 2 Denio 443, as construed in the later case of Darlington v. Mayor, 31 N. Y. 164, 200, it is held in New York that such a use of water is a public and governmental use.

## V.

The use of the water by defendant was trifling and a reasonable use. Apart from all the other grounds urged by defendant in this case, the judgment of the court below should be sustained on the ground that the use made by the city, all things considered, is but a rea-

sonable use. We are met at the outset by plaintiffs' claim, that the city cannot by virtue of its riparian ownership of the land on the shore of Lake Baldwin divert water from the stream to supply a city at a distance. We may concede this might be true, did the right of the city to these waters rest on the riparian ownership only. But the defendant is a grantee or licensee of the state, and the question must be considered to be whether the state as the owner of a usufruct of the waters of Lake Baldwin may take for its use a reasonable amount of this water, as against riparian owners or others; for, as proprietor of the bed, it has a title to usufruct of the water in common with the riparian owners.

Each riparian proprietor has a right to the ordinary use of the water flowing past his land, for the purpose of supplying his natural wants, including the use of the water for his domestic purposes and for his stock. For these purposes he may, by the weight of authority, if necessary, consume all the water of the stream. He has also the right to use it for any other purpose, as for irrigation or manufactures; but this use is called an extraordinary use, and is subordinate to the right of others to consume all the water for domestic purposes.

Gould on Waters, Sections 205 and 206.

The rights plaintiffs claim in the water is of the second class,—the extraordinary use, and this right of use does not extend to all the water which would naturally flow down stream, but to such as remains after an abstraction of so much by others as is necessary to

a reasonable use of the water common to all. In the cases at bar the use by the city must be deemed a reasonable use, it being inappreciable to the eye in its effect on the river; and the right of user to this extent may be predicated on an interest in the water arising from ownership of the bed, as distinguished from the bank, and, therefore, within the limits of a reasonable user, just as permissible, even at a distance from the river, as the riparian right of use under the ordinary rules. Moreover, the use made of it is of a nature to which plaintiffs' uses are usually subordinate, viz., domestic use. As to reasonable uses, see

Gould on Waters, 208-209.

*Red River Roller Mills v. Wright*, 30 Minn. 249.

## VL

The use by plaintiffs was made of their riparian land; all the mill property is owned by others. Their use then is not strictly riparian and cannot give them a cause of action for diversion against an upper proprietor. See the reasoning of the majority opinion in

*Stockport Water Works Co. v. Potter*, 7 H. & N. 160; 1 H. & C. 300.

## VII.

It is submitted that the water power in controversy is made possible only by convention of the parties holding land on each side of the stream; that either has the natural right to the flow of the water at its usual height past his land; and interference with this

right alone is the measure of an upper holder's liability. By making use of a water which neither alone could make, a property is brought into being which is not a natural riparian right, and a cause of action against another above for diverting water to interfere with this right alone, if such cause were sustained as valid, would impose a servitude on the upper property made possible only by a combination or contract between the lower proprietors, and therefore not sustainable, unless the ordinary rights of the owner above were previously condemned so as to prevent interference with such use. Unless contract relations between opposite owners prevent, each could tear down the dam on his side at any time, and this alleged right to water power would disappear.

### VIII.

Defendant is a municipal corporation, a branch of the state government. The use of the water by defendant is a public use. The state has granted the right to defendant to obtain its supply of water from the lakes and streams in question.

It has been shown under subdivision IV that defendant is no nearly allied to the city of St. Paul, and in its creation so limited to the one purpose—the supplying of water at the mere cost of the same to the citizens of St. Paul, that no question can properly be made but that the defendant is a mere agency of the state to carry out this design on behalf of the public.

It is provided (Sec. 6 and 8, Ch. 110 Sp. Laws 1885) that the defendant may enter any county of the state

to obtain its water supply, and may draw water from any lake or creek, or divert the water of any stream, creek or body of water. The provision of compensation for diversion of water must be held to apply only where rights exist which require compensation, as against the state.

Fay v. Salem & Danvers Aqueduct Co., 111 Mass.

27.

#### IX.

#### DEFENDANT FURNISHES WATER ONLY FOR PUBLIC USE.

The water coming from the Lake Phalen system is distributed through the older settled portions of the city—through the business portion. No water was drawn from any other source than Lake Phalen until after the purchase of the water works by the city. This was after 1883 and by the amendatory act of 1885, (Special Laws, chapter 110, section 5 Et. Seq.) the defendant was authorized and empowered to add to its source of supply, and to draw water from any lake or creek and to do any act necessary to furnish an adequate supply of water for the use of the city, and prior to the construction of the water works so as to connect with the lakes lying in the northwesterly direction from the city, there was no water taken from any source except Lake Phalen, and as the business portion of the city had already been furnished with water from this lake, it is a fair inference that since the construction of the new system the larger portions of the water still taken from Lake Phalen is consumed in the business portion of the city. The evidence does not show

the use of any water for any purposes other than those public uses to which water is generally devoted in the larger cities, through the department or officer having in charge the water works system of the city.

On the other hand, if the furnishing of water for the purpose of running the organs of three churches on Sundays is not a public use, there is nothing in the record showing where the water used for such purpose comes from, and the plaintiffs could not seek any relief on that ground unless it is shown that the water so furnished was pumped from Lake Baldwin, and the court will not make such an inference, and even if those churches are connected with the Lake Baldwin system, no court would grant any relief unless it were shown how much water was used for that purpose, and that plaintiffs suffered damage in consequence of that particular use of that particular amount of water. And herein is the difficulty of plaintiffs' position in respect to the alleged use of water for purposes not public. If such use there was, there is absolutely no evidence as to any particular amount of water used for purposes claimed by plaintiffs not to be public uses. How can a court grant relief in such a case if the court should be of the opinion that some of those uses are not public? The business portion of the city is supplied with water from Lake Phalen and if all the water coming from this source were devoted to uses not public, the plaintiffs could not complain.

How much water pumped from Lake Baldwin is used for purposes claimed by the plaintiffs to be unauthorized the record does not show. Is the amount

*infinitesimal*, or is it a few hundred gallons a day? Who can tell? This court cannot, nor does there exist any basis for the assessing of damages occasioned by the diversion of the waters for those supposed unauthorized uses. The plaintiffs failed to show that those waters were used for an unauthorized purpose, and it is well they have, even if some of the water had been used for purposes not authorized, for the great claim of the plaintiffs has been that there could be no use of these waters for public purposes without compensation, and having failed in that respect, they should not be permitted to raise in this court an incidental matter which is hardly made an issue by the pleadings. They did not institute these actions to restrain the use of a few gallons of water on the ground that such use was unauthorized, nor did the trial court proceed upon any such theory of these cases. Plaintiffs brought these actions to recover compensation for the water diverted and used for public purposes, and if they cannot maintain them on that ground, they should not be entitled to any relief on any other ground.

Respectfully submitted,

JAMES E. MARKHAM,  
Attorney for Defendant in Error.

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ST. ANTHONY FALLS WATER POWER COMPANY  
*v.* ST. PAUL WATER COMMISSIONERS.

MINNEAPOLIS MILL COMPANY *v.* SAME.

Nos. 23, 24. Argued October 13, 14, 1897. — Decided November 29, 1897.

The rights of riparian owners of land situated upon navigable rivers are to be measured by the rules and decisions of the courts of the State in which the land is situated, whether it be one of the original States or a State admitted after the adoption of the Constitution.

The Mississippi is a navigable river at all the points referred to in the records in these cases.

The grants made to the plaintiffs in error by the acts of February 26, 1856, and February 27, 1856, of the legislature of the Territory of Minnesota, to maintain dams and sluices in the Mississippi River, etc., etc., were subject at all times to the paramount right of the public to divert a portion of the waters for public uses, and to the rights in regard to navigation and commerce existing in the General Government, under the Constitution of the United States; and under those grants the plaintiffs in error took no contract rights which have been impaired in any degree by the acts of the legislature of Minnesota respecting the public waterworks of the city of St. Paul.

THESE actions were brought in a District Court of the State of Minnesota, by the respective plaintiffs in error against the defendant in error for the purpose of recovering damages for injury to their alleged rights as riparian owners and otherwise, at St. Anthony Falls on the Mississippi River, and also for a perpetual injunction enjoining the defendant in error from diverting the waters above so as to prevent them from flow-

## Statement of the Case.

ing in their natural course in the Mississippi River and down to the water power of the plaintiffs in error respectively.

The plaintiff in error, the St. Anthony Falls Water Power Company, was incorporated by an act of the Territory of Minnesota, approved on the 26th day of February, 1856, c. 137, p. 215. The first eight sections of the act relate to the incorporation of the company and to its internal affairs. The ninth section reads as follows:

"SEC. 9. The said corporators are hereby authorized for the purpose of the improvement of the water power above and below the Falls of Saint Anthony, in the Mississippi River, to maintain the present dams and sluices, and construct and maintain dams, canals and water sluices, erect mills, buildings or other structures for the purpose of manufacturing in any of its branches, or improving any water power owned or possessed by said company, in such manner or to such extent as shall be authorized by the directors of said company, and may construct dams on the rapids above or below the Falls of Saint Anthony, with side dams, sluices and all other improvements in the Mississippi River, upon the property owned or to be owned by said corporators, which may be necessary for the full enjoyment of the powers herein granted: *Provided, however,* That said corporation shall give a free passage for all loose logs that are to be manufactured on Hennepin or Cataract Islands, or between them on the falls through any dam or dams they may erect, on the west side of Nicollet or Hennepin Islands, and the passage through the pond, above said dam, shall, when needed, be twenty feet wide: *Provided,* That nothing herein contained shall be so construed as to authorize said corporation to interfere with the rights of property of any other person or persons whatever."

The Minneapolis Mill Company was also incorporated by an act of the legislature of the Territory of Minnesota, approved February 27, 1856, c. 145, p. 236, the ninth, eleventh and twelfth sections of which read as follows:

"SEC. 9. The said corporators are hereby authorized, for the purpose of the improvement of the water power above and

## Statement of the Case.

below the Falls of St. Anthony in the Mississippi River, to maintain the present dams and sluices, and to construct dams, canals and water sluices, erect mills, buildings or other structures for the purpose of manufacturing in any of its branches, or improving any water power owned or possessed by said company, in such manner and to such extent as shall be authorized by the directors of said company, and may construct dams on the rapids above or below the Falls of St. Anthony, with side dams, sluices and all other improvements in the Mississippi River which may be necessary for the full employment of the powers therein granted."

"SEC. 11. This act shall take effect and be in force from and after its passage, and may be amended by any subsequent legislative assembly, in any manner not destroying or impairing the vested rights of said corporators: *Provided*, That nothing herein contained shall be so construed as to authorize said corporation to interfere with the rights or property of any other person or persons whatever.

"SEC. 12. *Provided further*, That nothing contained in the act entitled an act to incorporate the St. Anthony Falls Water Power Company shall be so construed as to allow the said St. Anthony Falls Water Power Company to maintain or construct dams or sluices extending beyond the centre of the channel of the Mississippi River from the western bank of Hennepin Island, and said St. Anthony Falls Water Power Company are hereby restricted in the exercise of powers and privileges granted by the ninth section of said act to the space between the western bank of said island and the centre of said river: *Provided*, The said dam shall always be provided with suitable slides and sluices, so as to admit the passage of logs and timber down the Mississippi River, and that any future legislature may amend or modify this act or the act to which this section is amendatory: *And provided further*, That the Minneapolis Mill Company shall be restricted in its operations to the centre of the main channel of the Mississippi River and to the property belonging to said company."

By the second section of the act of Congress, approved February 26, 1857, 11 Stat. 166, c. 60, authorizing the people

## Statement of the Case.

of the Territory of Minnesota to form a State constitution, etc., it was enacted: "That the said State of Minnesota shall have concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on the said State of Minnesota, so far as the same shall form a common boundary to said State and any other State or States now or hereafter to be formed or bounded by the same; and said river and waters, and the navigable waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll, therefor."

Section two, article two, of the constitution of Minnesota has the same provision for the jurisdiction of the State over the Mississippi and other rivers and waters bordering on the State as is provided for in section two of the above act of Congress.

The complaints in the two cases are substantially similar, the two companies owning on different sides of the Mississippi River at about the same point, and the complaint in the case of the Minneapolis Mill Company contained the following among other allegations: It alleged the incorporation of the plaintiff in error, under the acts above mentioned, and also the incorporation of the defendant pursuant to an act of the legislature of the State of Minnesota, approved February 10, 1881, which has been amended by various acts supplemental thereto.

Plaintiff further alleged that pursuant to the provisions of its charter it acquired large tracts of land bordering upon the Mississippi River, and on the southwesterly bank thereof, lying within the present limits of the city of Minneapolis and county of Hennepin, and that by reason of the fall in said river at that point, which amounts to some seventy feet in the course of a thousand feet, there was created a natural water power of great extent and value; that the plaintiff, pursuant to the provisions of its charter and in accordance with the natural right inherent in the ownership of lands abutting upon the waters of said river, constructed dams and water sluices at great expense, for the purpose of making the water power

Statement of the Case.

available for manufacturing and other purposes to which the same was adapted, and by meeting those erected by the other company, and that by the erection of these dams on the opposite side of the river the plaintiff had made available the water power of the river to the extent of about fifty feet fall, leaving still unoccupied a further fall of about twenty feet; that in pursuance of its charter and in accordance with its rights as riparian owner, plaintiff in error had made contracts with different parties for the construction of mills and manufacturing establishments in convenient proximity to its water power, and for a valuable consideration had furnished and was furnishing water power to these different establishments which have use for the power, and that the same is of great value to the plaintiff; that it has reserved to itself large rents and income by leasing to other parties the right to use certain portions of the water.

And the plaintiff alleged that by reason of its ownership of the land bordering upon the river it had acquired and still owned all the riparian rights incident to the ownership of lands bordering upon the Mississippi River, which was stated to be a natural water course, in which there naturally flowed a large quantity of water derived from the river and also from numerous tributaries above, and that by reason of its riparian rights the plaintiff was entitled to have and require the natural flow of the waters of the river in the channels, both east and west in said river, adjacent to the lands at said falls without diminution or diversion of such natural flow by any person whatever.

It was further averred that one of the tributaries of the Mississippi River is a natural water course and stream known as Rice Creek, which drains waters from a large extent of territory within the State, and which are gathered together and have a natural flow or outlet through said creek into the Mississippi River, eight or ten miles above the water power of the plaintiff; that Rice Creek, in its natural course, flows through a small lake in the county of Anoka, designated as Baldwin Lake, and from thence to its connection with the Mississippi River; that the amount of water flowing in that

## Statement of the Case.

creek and lake varies with the different seasons of the year, the ordinary amount being about thirty million gallons per day.

It is then further alleged that the defendant, acting under the provisions of the act of the legislature above mentioned, approved February 10, 1881, authorizing the city of St. Paul to purchase the franchises and property of the St. Paul Water Company and creating a board of water commissioners had acquired title to a portion of the land bordering upon Baldwin Lake, and had erected thereon pumping works and machinery for the diversion of the waters of the lake into a certain other lake situated in the county of Ramsey, which other lake had a natural outlet through streams flowing into the Mississippi River below the water power of plaintiff, and that the defendant had for the greater part of the time during the two years before the commencement of this action, by means of its works on Baldwin Lake, withdrawn from that lake a quantity of water to the amount of ten million gallons per day, and that the quantity thus pumped from that lake was diverted by the defendant into a lake known as Pleasant Lake, and from thence it had been drawn by the waterworks of the defendant into the city of St. Paul, and distributed over that city and used for domestic purposes and for furnishing water for steam engines and other manufacturing purposes, and for the propulsion of elevators and other machinery, and that the waters thus used had been entirely diverted from Rice Creek and from that part of the Mississippi River above the water power of plaintiff, and no part thereof had been returned to the Mississippi River above the water power of plaintiff so as in any way or manner to be made useful to plaintiff.

The plaintiff further alleged that the defendant, although assuming to act in accordance with its charter, had not acquired the right to divert the waters naturally flowing in Rice Creek and through Baldwin Lake from their natural course, nor had defendant made compensation to plaintiff and other parties beneficially interested in the use of said water, nor had defendant made any provision for computing the

## Statement of the Case.

amount of compensation due plaintiff for damages caused by diverting and withdrawing the waters of the river from their natural course; that by reason of this diversion of water the income and profits arising from the maintenance of the water power were diminishing, (to an amount stated in the complaint,) and that the damages sustained by the plaintiff by reason of the diversion amounted to the sum of \$1500.

Judgment was demanded that the plaintiff should recover its damages already sustained in the sum of \$1500, and that the defendant should be perpetually enjoined from interfering with or diverting the waters which would otherwise naturally flow into Lake Baldwin, so as to prevent them from flowing in the natural course to said Rice Creek and Mississippi River to the water power of said plaintiff.

The answer of the defendant averred that the defendant existed as a corporation and executive department of the city of St. Paul, of the State of Minnesota, under and by virtue of the acts referred to in the complaint, as approved February 10, 1881, and amended January 25, 1883, and March 4, 1885, and that the defendant, under these acts and under the charter of the city of St. Paul, exercised all of the authority of the city of St. Paul with respect to acquiring lands and franchises for and the construction of waterworks for the purpose of supplying the city of St. Paul and its inhabitants with pure water for all public purposes.

The defendant also averred that by virtue of the authority granted by the acts of the legislature, above referred to, and by the charter granted to the city of St. Paul, the defendant had secured the right of way from the city of St. Paul to said Baldwin Lake, and by the use of mains, ditches and pumps it had drawn and was drawing from that lake and was bringing to the city of St. Paul water for the use of the city and its inhabitants, and that the defendant and the city of St. Paul are the owners in fee simple of a large tract of real estate bordering on Lake Baldwin, upon which lands it had erected buildings and placed therein pumps, etc., for the purpose of drawing water from that lake for the purpose of supplying the city of St. Paul with water.

## Statement of the Case.

Other averments were made not material to be here mentioned.

The defendant claimed the right to take the water from Baldwin Lake and conduct the same to the city of St. Paul for the use of said city and its inhabitants, (without making any compensation or payment therefor to the plaintiff,) by reason of the legislative authority above mentioned.

A similar answer was put in by the defendant in the case of the St. Anthony Falls Water Power Company.

Replies to these answers were put in by the plaintiffs in error taking issue on the matters of fact therein alleged.

Upon these pleadings the two actions came on for trial in the state court and were tried together. Evidence was given upon the part of the plaintiffs tending to support the allegations of the complaints, and after the plaintiffs had rested, the defendant moved that the actions should be dismissed on the ground that there was no liability on the part of the defendant to either of the plaintiffs, because the Mississippi River was a navigable river, its beds and its waters being owned by the State of Minnesota, and that the board of water commissioners, defendant herein, was a part of the city government of the city of St. Paul, authorized by the legislature to draw water from any of the lakes of the State for the purpose of supplying water to the city of St. Paul; that the defendant acted as agent of the State and in the name of the State, supplying the citizens of the State with water owned by the State, which the State had a right to use for that purpose, and that such right was paramount to the rights of any riparian owners; also on the ground that nothing but a reasonable use had been shown by the defendant as riparian owner of land on Lake Baldwin; also that plaintiff's dams are a purpresture, and that plaintiffs can have no right to the use of water obtained in that way; also that their riparian rights do not extend to the use of water on land not owned by them, or, as against the defendant, to power obtained which requires the flowage of land other than their own.

The motion to dismiss was granted in each case, to which the plaintiff in each case duly excepted.

Opinion of the Court.

A motion for a new trial was made before the trial court upon a case and exceptions, and the motion, after hearing counsel, was denied. The plaintiffs then appealed to the Supreme Court of the State from the order of the District Court denying plaintiffs' motion for a new trial and from the whole thereof. The Supreme Court affirmed the order and directed that the defendant should have judgment accordingly. Upon the affirmance of the judgments by the Supreme Court the plaintiffs obtained a writ of error in each case from this court, and the records are now before us for review.

*Mr. Rome G. Brown* for plaintiffs in error. *Mr. Charles S. Albert* was on his brief.

*Mr. James E. Markham* and *Mr. Herman W. Phillips* for defendants in error.

Mr. JUSTICE PECKHAM, after stating the case, delivered the opinion of the court.

It is claimed upon the part of the plaintiffs in error that by the decision of the court below they have been deprived of their property without due process of law. They urge that they have certain rights as riparian owners of land near St. Anthony Falls, bordering upon the Mississippi River, to the use of all the water as it would naturally flow past their land, and that this right is property; that its existence and extent are to be determined by the general law applicable to riparian owners in like situation, which right is not determined conclusively by a state court, and that being property it cannot be taken away or impaired either by other private owners or by the State, except that if the latter should require the use of any portion of the water for any public purpose it may only be taken or diverted upon due compensation being made. These rights, it is claimed, are protected by the Federal Constitution, and that as such claim was duly presented before the state tribunal, the question is now open for review by this court.

## Opinion of the Court.

If wrong in their above claim the plaintiffs in error then urge that if it be assumed that the State originally had the power to make a diversion of some portion of the water in the Mississippi River for the purpose of supplying the city of St. Paul with water, yet that through the action of the territorial legislature in 1856, in granting these plaintiffs in error their charters, with the powers and rights therein named, the Territory gave and released to plaintiffs in error the right to use all of the water naturally flowing in the river past their lands for the purpose of power free from the right of any subsequent territorial or state legislature to divert the waters in the manner complained of herein without making compensation.

These charters are claimed by the plaintiffs in error to be contracts, the obligations of which no subsequent legislature could impair, and it is argued that the act of 1881 and the subsequent acts amendatory thereof, granting to the defendant in error a right to use water for the purposes therein named, do impair the obligations of these contracts, and therefore are absolutely void.

They also urge that, even if their riparian rights are to be governed by the general rules of law laid down by the highest court of Minnesota, it will be found that the former decisions of that court upon that subject have fixed in plaintiffs the property rights which they here claim, and that this court should not be bound by the last decision of the state court upon the question, as evidenced by the judgment under review, because it is wholly inconsistent and at war with all the prior decisions of the state court, and ought not to be followed.

These contentions on the part of the plaintiffs in error are now to be examined.

(1) In regard to the first proposition, we are of opinion that the property rights of the plaintiffs in error, as riparian owners, are to be measured by the rules and decisions of the state courts of Minnesota. This principle, we think, has been announced and adhered to by this court from its very early days, and no distinction has been made between the rights of the original States and those which were subsequently admitted

## Opinion of the Court.

to the Union under the provisions of the Federal Constitution. The provisions of the act of Congress, already cited, (act of February 26, 1857, c. 60, § 2, 11 Stat. 166,) making the Mississippi River a common highway for the inhabitants of the State and all other citizens of the United States, do not impair the title and jurisdiction of the State over the navigable waters within her boundaries more than rights of that nature are limited with regard to the original States. This has been uniformly held, and is so stated in many of the cases hereinafter cited where similar language has been used in the acts admitting States into the Union.

Preliminarily, it may be said that the Mississippi River at the point in question is a navigable stream. In order to be navigable, it is not necessary that it should be deep enough to admit the passage of boats at all portions of the stream. One witness for the plaintiffs in error said that in its natural state the river at this point was not navigable at ordinary stages of the water for half a mile below St. Anthony Falls, and in its natural state it was not navigable immediately above the falls, but that it was navigable in its natural state above Nicollet Island. He also stated that when he said the Mississippi River was not navigable at these falls, he meant that it was not navigable for boats; that boats could not go up and down in its natural condition; that it was always used for logs with chutes that are artificially prepared. It was navigable below the rapids and navigable above the rapids, and that the dam made it so. It was navigable above the rapids for the purpose of running shallow boats and for floating logs. What is said hereafter in regard to the river is based upon the really unquestionable fact that it is a navigable river at all points referred to in these records.

In *Martin v. Waddell*, 16 Pet. 367, it was held that, when the American Revolution was concluded, the people of each State became themselves sovereign, and in that character held the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the General Government. The action was ejectment for 100 acres of land

## Opinion of the Court.

covered with water in Raritan Bay in the township of Perth Amboy, in the State of New Jersey. The claim of the plaintiff was founded upon the charters of Charles II to his brother, the Duke of York, in 1664 and 1674, for the purpose of enabling him to plant a colony on the continent of America, the land in controversy being within the boundaries of the charters and in the territory which now forms the State of New Jersey. Those letters patent, as construed by this court, conveyed to the Duke of York all the prerogatives and powers of government residing at the time of their execution in the King of Great Britain, and passed from the jurisdiction of Great Britain to the people of each State after the Revolution. Although the question in that case arose in regard to lands covered with water in Raritan Bay, yet the principles upon which the case was decided have been stated to apply to the rights of the States in regard to all navigable waters within their jurisdiction.

In *Pollard v. Hagan*, 3 How. 212, the question arose in regard to the rights of the State of Alabama in the shores of navigable waters and the soils under them within her limits. The sixth section of the act of Congress, passed on the 2d of March, 1819, 3 Stat. 492, c. 47, for the admission of the State of Alabama into the Union, provided: "That all navigable waters within the said State shall forever remain public highways, free to the citizens of said State and of the United States, without any tax, duty, impost or toll therefor, imposed by said State." It was held that the Government of the United States did not by reason of that enactment possess any more power over the navigable waters of Alabama than it possessed over the navigable waters of other States under the provisions of the Constitution, and that Alabama had as much power over those navigable waters as the original States possessed over the navigable waters within their respective limits. It was also held that the shores of navigable waters and the soils under them were not granted by the Constitution of the United States, but were reserved to the States respectively, and the new States had the same rights, sovereignty and jurisdiction over the subject as the original States.

## Opinion of the Court.

In *Goodtitle v. Kibbe*, 9 How. 471, the decision of this court in *Pollard v. Hagan, supra*, was referred to and affirmed, and it was said that, by the admission of the State of Alabama into the Union, that State became invested with the sovereignty and dominion over the shores of the navigable rivers between high and low water mark, and that after such admission Congress could make no grant of land thus situated.

In *Barney v. Keokuk*, 94 U. S. 324, it was recognized as the law that the title and rights of riparian proprietors upon the banks of the Mississippi were to be settled by the States within which the lands were included. Mr. Justice Bradley, in stating the opinion of the court in that case, said (at page 338): "And since this court in the case of *The Genesee Chief*, 12 How. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the States in which the lands were situated. In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject."

It was also said by the same learned justice in speaking of the English idea of navigable waters being necessarily tide waters: "It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States them-

## Opinion of the Court.

selves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principles were laid down in *Martin v. Waddell*, 16 Pet. 367; *Pollard's Lessee v. Hagan*, 3 How. 212, and *Goodtitle v. Kibbe*, 9 How. 471. These cases related to tide water, it is true; but they enunciate principles which are equally applicable to all navigable waters."

In *St. Louis v. Myers*, 113 U. S. 566, this court held that the act of March 6, 1820, 3 Stat. 545, admitting the State of Missouri into the Union, left the rights of riparian owners on the Mississippi River to be settled according to the principles of state law. Mr. Chief Justice Waite, in delivering the opinion of the court, said: "The act of Congress providing for the admission of Missouri into the Union, act of March 6, 1820, c. 22, 3 Stat. 545, and which declares that the Mississippi River shall be 'a common highway and forever free,' has been referred to in the argument here, but the rights of riparian owners are nowhere mentioned in that act. They are left to be settled according to the principles of state law."

In *Packer v. Bird*, 137 U. S. 661, it was held, that as the highest court of California had decided that the Sacramento River being navigable in fact, a title upon it extends no farther than to the edge of the stream, this court would accept that decision as expressing the law of the State. That case asserted the right of each State to determine the extent of the title and of the rights of the riparian owners in waters within the territory of the State. It was also stated that the Federal courts must construe grants of the General Government without reference to the rules of construction adopted by the States for grants by them, but that whatever incidents or rights attach to the ownership of property conveyed by the United States bordering on navigable streams, would be determined by the States in which it is situated, subject to the limitation that their rules do not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee. It was further said that: "As an incident of such ownership the right of the riparian owner, where the waters are above the influence of

## Opinion of the Court.

the tide, will be limited according to the law of the State, either to low or high water mark, or will extend to the middle of the stream."

It does not impair the efficacy of the grant or the use and enjoyment of the property by the grantee to hold that riparian rights are to be decided by the state courts, inasmuch as the grant, if by the Federal Government, has been held in the cases already cited, not to include title over navigable waters within or bounded by the States.

In *Hardin v. Jordan*, 140 U. S. 371, it was held that grants by the United States of its public lands bounded on streams and other waters, made without reservation or restriction, are to be construed, as to their effect, according to the law of the State in which the lands lie, and that it depends upon the law of each State to what extent the prerogative of the State to lands under water shall extend. In the opinion, after stating that the title to the shore and lands under water is in the State and is regarded as incidental to its sovereignty, it is said: "Such title being in the State, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. . . . Sometimes large areas (of land) so reclaimed are occupied by cities and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce and subjecting the lands to the necessities and uses of commerce" (citing cases). Continuing, the court said: "This right of the States to regulate and control the shores of tide waters and the land under them is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the States, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the State; but it depends upon the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised."

## Opinion of the Court.

Mr. Justice Brewer, in his dissenting opinion (p. 402) in the above cited case, which was concurred in by Mr. Justice Gray and Mr. Justice Brown, agreed: "That the question how far the title of a riparian owner extends is one of local law. For a determination of that question the statutes of the State and the decisions of its highest court furnish the best and the final authority." And the dissent was based upon the theory that although the right of the State to determine this matter was not questioned in the prevailing opinion, there was, nevertheless, error committed by the majority of the court in refusing to follow a decision of the state court on the very question then under review, and in following instead thereof previous decisions of the state court inconsistent therewith.

In *St. Louis v. Rutz*, 138 U. S. 226, 242, cited in the dissenting opinion above referred to, it was said by Mr. Justice Blatchford, in delivering the opinion of the court: "The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property which is governed by the local law of Illinois."

In *Kaukauna Water Power Company v. Green Bay & Mississippi Canal Co.*, 142 U. S. 254, Mr. Justice Brown, in delivering the opinion of the court, said at page 271: "It is the settled law of Wisconsin, announced in repeated decisions of its Supreme Court, that the ownership of riparian proprietors extends to the centre or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels (citing cases). In *City of Janesville v. Carpenter*, 77 Wisconsin, 288, 300, it is said of the riparian owner: 'He may construct docks, landing places, piers and wharves out to the navigable waters, if the river is navigable in fact, but if it is not so navigable he may construct anything he pleases to the thread of the stream, unless he injures some other riparian proprietor, or those having the superior right to use the waters for hydraulic purposes. . . . Subject to these restrictions, he has the right to use his land under water the same as above water. It is his pri-

## Opinion of the Court.

vate property under the protection of the Constitution, and it cannot be taken, or its value lessened or impaired even for public use, "without compensation," or "without due process of law," and it cannot be taken at all for any one's private use.' With respect to such rights, we have held that the law of the State, as declared by its Supreme Court, is controlling as a rule of property."

In *Shively v. Bowlby*, 152 U. S. 1, it was again said that the new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters and in the lands under them within their respective jurisdictions. It was also remarked that, upon the question, how far the title of the owner of the land extends bounding upon a river actually navigable, but above the ebb and flow of the tide, there is a diversity in the laws of the different States; and that the title and rights of riparian or littoral proprietors in the soil below high-water mark are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.

The suit was in the nature of a bill in equity brought to quiet title to lands below high-water mark in the city of Astoria, the question involving the rights in navigable waters as between the State and others. The opinion at page 57 states as follows: "By the law of the State of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court above referred to, the law of Oregon governs the case." The opinion refers to all the cases which we have above cited and many others, upon the various questions which are discussed in the case, and recognizes the rule that it belongs to the States to decide as to the character and extent of the riparian rights of owners upon navigable waters within such States.

It is true that in these various cases the exact point in controversy in this case in regard to the rights of the State as against riparian owners has not arisen. The dispute has generally been as to the extent and character of the title as be-

## Opinion of the Court.

tween the United States or the State and the riparian owner to lands under water, and as to the right of the riparian owner to build out from the shore piers or wharves so as to reach the navigable portion of the stream; but the principles laid down in all of these cases necessarily include the right of the state courts to decide, as a matter of local law, the point now under discussion, subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers. The jurisdiction of the State over this question of riparian ownership has been always, and from the foundation of the government, recognized and admitted by this court. The extent of the plaintiff's riparian right of property was therefore the subject of adjudication by the state court, and the rule has been definitely stated by that court in its judgment, which is now under review.

(2) It is claimed, however, by the plaintiffs in error that this judgment is the only case in the State where the ruling made therein has been adopted, and that this particular judgment is at war with and opposed to every other ruling upon the subject heretofore made by the Supreme Court of that State; and they contend that upon the authority of *Hardin v. Jordan, supra*, this court should disregard the judgment of the state court in this case and follow the previous decisions of that court on this subject. As to the case of *Hardin v. Jordan*, it may be said that it went as far as this court ought to go in refusing to follow the latest decision of the highest court of a State in regard to a matter upon which the judgment of that court is regarded as conclusive. It will be observed, however, that the decision in *Hardin v. Jordan*, in refusing to follow the ruling of the Supreme Court of Illinois, in *Trustees of Schools v. Schroll*, 120 Illinois, 509, was placed upon the asserted fact that such ruling of the Supreme Court of Illinois was not necessary to the decision of the case, and that, being opposed to the entire course of the previous decisions of that State, it should be disregarded. It is not so here. The ruling of the state court was necessary to the decision of this case and stands as the latest, if not the only, exposition

## Opinion of the Court.

of the views of that court upon the question involved. We ought, therefore, to follow that case.

However, with regard to the decisions of the state court upon this subject, cited by counsel for the plaintiffs in error, we think there is not one of them which is inconsistent with the decision of that court in the cases now under review. The question did not arise in any of them upon the right of the State as against plaintiffs in error, or any one in like situation, to divert a portion of the flow of the water in the Mississippi River to any public purpose so long as it did not interfere with the navigation of the river.

The cases of *Schurmeier v. St. Paul & Pacific Railway*, 10 Minnesota, 82; *Brisbine v. St. Paul & Sioux City Railroad*, 23 Minnesota, 114; *Morrill v. St. Anthony Falls Water Power Co.*, 26 Minnesota, 223; *Minnesota v. Minneapolis Mill Co.*, 26 Minnesota, 229; *Union Depot &c. v. Brunswick*, 31 Minnesota, 297; *Hanford v. St. Paul & Duluth Railroad*, 43 Minnesota, 104; and *St. Anthony Falls Water Power Co. v. Minneapolis*, 41 Minnesota, 270, are cited to sustain the contention of the plaintiffs in error.

An examination of these cases shows that the question did not arise and was not decided in any of them. Some of the cases relate to the question as to what was the proper boundary, high or low water mark, of lands mentioned therein, and in others the question arose as to the riparian right of owners of lands adjoining the Mississippi River to build piers or docks out to the navigable portion of the stream, or to fill up and build upon a portion of the river out to its navigable part; or it was a question of the right of a riparian proprietor to compensation from a railway company seeking to condemn for the purposes of its railway a certain portion of land owned by him between the centre of a street and the centre of the channel of the river. In none of the cases was there involved the right of the State to divert for public purposes a portion of the flow of a river, while not in the slightest degree or in any way affecting the navigability of the stream.

In *Union Depot &c. v. Brunswick* and in *Brisbine v. St. Paul &c. Company, supra*, substantially the same questions

## Opinion of the Court.

arose, and in the latter case, in speaking of some of the riparian rights of an owner upon the banks of a navigable stream, the court said :

" What these rights are, especially in regard to land acquired originally from the United States, and bordering, as this does, upon the Mississippi River, we regard as fully and correctly settled by the Federal Supreme Court. *Dutton v. Strong*, 1 Black, 23; *Railroad Company v. Schurmeier*, 7 Wall. 272; *Yates v. Milwaukee*, 10 Wall. 497. According to the doctrine of these decisions the plaintiff possessed the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain, for his own and the public use, suitable landing places, wharves and piers, on and in front of his land, and to extend the same therefrom into the river to the point of navigability, even though beyond low-water mark, and to this extent exclusively to occupy, for such and like purposes, the bed of the stream, subordinate and subject only to the navigable rights of the public and such needful rules and regulations for their protection as may be prescribed by competent legislative authority. The rights which thus belong to him as riparian owner of the abutting premises were valuable property rights, of which he could not be divested without consent, except by due process of law, and, if for public purposes, upon just compensation. *Yates v. Milwaukee*, 10 Wall. 497."

In *Union Depot Street Railway v. Brunswick and others*, 31 Minnesota, 297, it was held to be the settled law of Minnesota that a riparian owner upon a navigable stream has the fee to low-water mark; and that in addition he owns as an incident to his ownership certain riparian rights, among which are the right to enjoy free communication between his abutting premises and the navigable channel of the stream, to build and maintain suitable piers, landings or wharves on and in front of his land, and to extend the same therefrom into the stream to the point of navigability even beyond low-water mark, and to this extent exclusively to occupy for such and like purposes the bed of the stream, subordinate only to the paramount public right of navigation. These riparian rights

## Opinion of the Court.

the court held to be property, and that they were not to be taken by the State without paying just compensation therefor. The rights which were held subordinate only to the paramount public right of navigation were those mentioned by the court, and not a word was said as to the right of flowage, which was not involved and was not alluded to.

In *Morrill v. St. Anthony Falls Water Power Company*, *supra*, the Supreme Court of Minnesota held that the riparian owner of lands upon a navigable stream may use the water flowing past his land for any purpose, so long as he does not impede navigation, in the absence of any counter-claim by the State or the United States. It will be seen that this case does not refer to the right to receive the full amount of the natural flowage from above, but only to the right to use that which does flow, in the absence of any counterclaim by the State or the United States.

The same general statement of the rights of riparian owners is made in *Hanford v. St. Paul & Duluth Railroad*, *supra*. That case treats of the rights of a riparian owner in the bed of the stream above low-water mark as subject to the right of the public to use the same for the purposes of navigation, and adds that "restricted only by that paramount public right, the riparian owner enjoys valuable proprietary privileges, among which we shall consider particularly the right to the use of the land itself for private purposes. . . . Subject only to the limitation that he shall not interfere with the public right of navigation, he has the unquestionable and exclusive right to construct and maintain suitable landings, piers and wharves into the water and up to the point of navigability for his own private use and benefit (citing cases). . . . And it is obviously immaterial, if the public interests be not prejudiced, whether the submerged land be covered with wharves of timber or stone, or be reclaimed from the water by filling in with earth so that it becomes dry land. The land may be so reclaimed." It is also said in the course of the opinion: "The limit to the private right is imposed by the public right, and the private right exists up to the point beyond which it would be inconsistent with the public right."

## Opinion of the Court.

All this was said in regard to the case then under discussion, which related to the right of a riparian proprietor to reclaim the submerged land to the point of navigability, and to alienate the same so that the alienee might have the rights of the riparian owner, although having no interest in the original riparian estate. The question here involved was neither decided nor considered.

In *Schurmeier v. St. Paul & Pacific Railroad Company*, 10 Minnesota, 82, which was affirmed in 7 Wall. 272, it was held that the grantee from the United States had his line bounded by the river, at least to low-water mark, and when after the grant was made to him he platted it into blocks as part of the town of St. Paul that he still retained in the land over which the streets and landing were laid the fee, subject only to the use of the public for the purposes designated, and that the railroad company, having no legal authority to use the streets or landing for railroad tracks, and such use being a special injury to the plaintiff, he was entitled to an injunction. In that case Mr. Chief Justice Wilson, in the state court, was of the opinion that the riparian proprietor went to the middle of the river; that that was the rule at common law, and, in his opinion, there was no reason to doubt that the common law prevailed in Minnesota as to that question; but while so holding, as his individual opinion, he said that other authorities regarded the boundary line of the riparian proprietor to be low-water mark, and even on that assumption the place in dispute was within the title of the riparian proprietor.

The state court subsequently decided that the title of a riparian owner on a navigable stream went only to low-water mark.

*St. Anthony Falls Water Power Company v. City of Minneapolis, supra*, does not decide the point contended for by the plaintiffs in error. It was a contest between private parties as to the effect of a certain deed in reserving rights to the grantor and as to the extent of the right of flowage contained in the deed. The question here under discussion was not even remotely affected.

Opinion of the Court.

We have looked in vain among all the cases in the state court, cited by counsel for the plaintiffs in error, for any decision upon this question. Whatever may be the rights of the plaintiffs in error under their charters or as the riparian owners of land to build and maintain their dams to the centre of the stream, there is no decision cited which holds that they are entitled to the use of all the water which would naturally flow past their lands and over their dams so constructed, nor has the state court decided that the only right of the State, to which this alleged right of the plaintiffs in error is subject or subordinate in any way, is limited to the right of the State to control or use the bed of the stream and the waters therein for purposes of navigation only. That limitation has never been placed upon the State with reference to the point here in question. The state Supreme Court in deciding this particular case was not therefore announcing a rule which was at all inconsistent with or opposed to any of its former decisions; and as the extent of the riparian rights in this case was a subject committed to the jurisdiction of the State of Minnesota, we are bound, so far as this question is concerned, to follow the decision of the highest court of that State as announced in this case.

(3) If wrong in their above contentions, the plaintiffs in error then assert that their charters granted in 1856, and set forth so far as material in the foregoing statement of facts, gave and guaranteed to them the right to use and develop the water power of St. Anthony Falls, and authorized them to build such structures in and upon the river as were necessary to develop that power, and that when these provisions of their charters were accepted and acted upon, they became contract obligations between the State of Minnesota and the plaintiffs, and that the statute above mentioned, authorizing the defendant to divert some portion of the natural flow of the water without compensation to the plaintiffs, was a violation of the Federal Constitution, as impairing the obligation of the contracts contained in the charters referred to.

We think this contention cannot be maintained. We are of opinion that the true construction of these territorial

## Opinion of the Court.

charters does not give such contract rights as are claimed by the plaintiffs in error. They were grants of power to the respective companies, under which they were licensed to build their dams out into the river for the purpose of utilizing the power, and of using the water that flowed down the river. These grants were in legal effect subject at all times to the paramount right of the State as trustee for the public to divert a portion of the waters for public uses, and they were also subject to the rights in regard to navigation and commerce existing in the General Government under the Constitution of the United States. See also upon this subject, *Watuppa &c. Co. v. Fall River*, 147 Mass. 548; *City of Auburn v. Union Waterpower Co.*, 38 Atlantic Rep. 561, Supreme Court of Maine, Oct. —, 1897. There was no contract by virtue of these charters that the companies should always and for all time be entitled to all the natural flow of the water in the river without regard to the right of the State as above mentioned. The claim made by the companies seems to us most extravagant. The State or any particular subdivision thereof acting under its authority would, if these claims were valid, be forever thereafter prevented from using any portion of the waters of the river for any public purpose unless compensation for such use were first made these plaintiffs. This construction of the meaning of the charters assumes the power of a territorial or state legislature to bind future legislatures in dealing with these public rights, and it prevents the latter from providing for the use of any portion of the waters for public purposes of the most important character without first making compensation to the plaintiffs for that use. If we should assume the validity of an act of the legislature of such a character, (which, under the decision of this court in *Illinois Central Railroad v. Illinois*, 146 U. S. 387, is at least doubtful,) it is clear that we ought not to adopt a construction leading to that result unless the legislative act be plain and beyond all doubt. We are of opinion that these particular charters of the plaintiffs are not to be thus construed. The sections of the acts which are material upon this point simply authorize the companies to maintain their dams and sluices,

## Opinion of the Court.

and permit them to construct and maintain other dams, etc., for the purpose of manufacturing, or for improving any water power owned or possessed by the companies, in such manner or to such extent as shall be authorized by the directors. But there is no language in the acts providing that the companies shall thereafter and always have the right to the use of all the natural flow of the water down the river. Nor is such right a necessary and legal consequence of the language used. They may have acquired by these acts the right to build dams, etc., and the right to use such water as in fact and from time to time should flow down to their dam, but there is nothing in the language of the charters showing or implying that it was the intention of the State to grant to these parties the rights now claimed by them. It is difficult to believe that a legislature would ever grant to individuals or companies rights of that nature, even if it be assumed it had the power. It was proper and in accordance with a wise public policy to grant a privilege to these companies to build dams, etc., as stated in the charters, and to permit them, by virtue of the dams and sluices, to use the water that in fact and from time to time might come down the river, but it cannot be supposed that the legislature meant by any grant of this kind to warrant that for all future time no part of the water that might otherwise naturally flow down the river should ever be used under the authority of the State for any public purpose, without compensating the plaintiffs for that diversion.

In *Rundle v. Delaware & Raritan Canal Co.*, 14 How. 80, this court held, that by the law of Pennsylvania the Delaware River was a public navigable river, held by its joint sovereigns (the States bordering thereon) in trust for the public; that riparian owners in that State had no title to the river, or any right to divert its waters, unless by license from the States; that such license was revocable and in subjection to the superior right of the State to divert the water for public improvements, either by the State directly, or by a corporation created for that purpose; and that the proviso to the provincial acts of Pennsylvania and New Jersey of 1771 did not operate as a grant of the usufruct of the waters of the river to Adam

## Opinion of the Court.

Hoops and his assigns, but only as a license or toleration of his dam. It appeared in this case that the plaintiffs in error, being plaintiffs below, were the owners of certain mills in Pennsylvania opposite the city of Trenton in New Jersey; that the mills were supplied with water from the Delaware River by means of a dam extending from the Pennsylvania shore to an island lying near and parallel to it and extending along the rapids to the head of tidewater. The plaintiffs claimed that by virtue of a proviso in the acts of the provincial legislatures of Pennsylvania and New Jersey, their predecessors had become entitled to the free and uninterrupted enjoyment of the river Delaware for the use of their mills, and that, notwithstanding, the defendants had erected a dam in the river above plaintiffs' mills and had dug a canal and diverted the water to their great injury. A demurrer was interposed, upon which the court below gave judgment for the defendants, and this court was asked to review and reverse that judgment. It was held that the proviso was nothing more than a license to keep the dam up, which could at any time be revoked.

A careful consideration of the acts in question persuades us that they are not to be construed as plaintiffs claim, and that under them the plaintiffs took no contract rights which have been impaired in any degree by the subsequent acts under which defendants claim the rights set up in their respective answers.

These views lead us to the opinion that the judgments of the Supreme Court of Minnesota in these cases are right, and they are, therefore,

*Affirmed.*